

## **Part II**

# **The Implementation of Directive 2001/29/EC in the Member States**

Guido Westkamp

*Queen Mary Intellectual Property Research Institute*

Centre for Commercial Law Studies

Queen Mary, University of London

February 2007

This study was commissioned by the European Commission's Internal Market Directorate-General, in response to the invitation to tender MARKET/2005/07/D. The study does not, however, express the Commission's official views. The views expressed and all recommendations made are those of the authors.



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*Acknowledgements*

The author is grateful for assistance in preparing this document to the following colleagues and institutions:

- *Dr Dariusz Adamski, University of Wroclaw, Poland, (Poland).*
- *Dr Patricia Akester, University of Cambridge, (Portugal)*
- *Professor Jon Bing, University of Oslo, Norway (Norway)*
- *Ms Michelle Bonello, Ministry of Competition and Communications, Valletta (Malta)*
- *Petra Boškin, Intellectual Property Office, Ljubljana (Slovenia)*
- *Dr Veronica Brazdova, Attorney, Prague (Czech and Slovak Republic)*
- *Mr Gaetano Dimita, Attorney and Ph.D. Candidate, Queen Mary, University of London (Italy)*
- *Dr Séverine Dusollier, Université Namur, Belgium (Belgium and France)*
- *Professor Mihály Ficsor, Hungarian Copyright Experts Council, Budapest (Hungary)*
- *Dr Christina Garrigues, Attorney, London (Spain)*
- *Dr Lucie Guibault, Universiteit van Amsterdam (The Netherlands)*
- *Professor Horst-Peter Götting, TU Dresden (Germany)*
- *Ms Claudia Kern, Attorney and Former Research Assistant, Queen Mary Intellectual Property Research Institute*
- *Mr Mindaugas Kiskis, Attorney, Vilnius, Lithuania (Lithuania)*
- *Mr Attila Komives, Attorney, Budapest (Hungary)*
- *Mrs Anne Lauber-Rönsberg, Senior Research Fellow, TU Dresden (Germany)*
- *Mamo TCV Advocates, Valletta (Malta)*
- *Mr Godwin Mangion, Ministry of Competition and Communications, Valletta (Malta)*
- *Clemens Salong Petersen, Senior Research Fellow, University of Copenhagen (Denmark)*
- *Corentin Pouillet, Université de Luxembourg (Luxembourg)*
- *Mr Noam Shemtov, Attorney and Ph.D. candidate, Queen Mary Intellectual Property Research Institute*
- *Dr. Tatiana Sinodinou, Attorney, Thessaloniki, Greece (Cyprus, Greece and Malta)*
- *Professor Adrian Sterling, Queen Mary Intellectual Property Research Institute (UK)*
- *Dr Viveca Still, University of Helsinki (Finland)*
- *Dr Benjamin Tóth, Society ARTISJUS, Budapest (Hungary)*
- *Sofia Vasconcelos Casimiro, Ph. D. candidate, Queen Mary, University of London (Portugal)*
- *Professor Michel Walter, Attorney, Vienna (Austria)*
- *Ms Sanna Wolk, University of Stockholm (Sweden)*



## I INTRODUCTORY REPORT

This chapter summarises the findings of the country reports. Specific emphasis is given to the implementation of exclusive rights, limitations and the legal protection of technological protection measures. The aim is to portray areas in which Member States have significantly deviated from the Directive, and to highlight specific problem areas that may have a detrimental and disharmonising effect within the Internal Market. The report also draws attention to recent judicial decisions that affect the subject matter regulated under the Directive.

### A. Exclusive Rights

All Member States grant the exclusive rights foreseen under Articles 2 to 4 of the Directive. The deviations are slight as regards the text of the Directive, although it should be noted that there are some fundamental discrepancies particularly with respect to the systematic categorisation of rights, which may have certain disharmonising effects. This is particularly true of the distribution right and its exhaustion. Differences can also be asserted in relation to the implementation of Article 3 concerning the right of communication to the public, while some minor variations exist as regards the scope of the reproduction right (Article 2).

The systematic classification of economic rights is traditionally dissimilar between jurisdictions following the *droit d'auteur* tradition and jurisdictions based on the common law copyright approach. In common law jurisdictions (Ireland and the UK), the typical classification of economic rights distinguishes between acts of primary and secondary infringement, applicable concurrently to authorial and entrepreneurial works. Typically, acts of primary infringement correspond to the enumeration of exclusive rights under international convention law. These rights are absolute and proprietary in nature in that they can be enforced as against any infringer, whether acting in bad faith or not. Acts of secondary infringement require the presence of an infringing copy. Enforcement of such rights does require bad faith on the part of the alleged infringer in that fault must be proven as regards the knowledge that the copy was infringing in order to claim damages<sup>1</sup>.

#### I. *Reproduction*

Article 2 obliges member states to introduce a broad reproduction right covering both the direct and indirect and the temporary permanent making of reproductions by any means, in whole or in part. The right is granted to authors and owners of neighbouring rights alike.

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<sup>1</sup> See *supra*, Report on the UK, **XXVIII**A, pp. 440.

The reproduction right, as formulated under Article 2, was literally implemented (or already existed) in Austria, Belgium, Cyprus, the Czech Republic, Denmark, Greece, Italy, Latvia, Lithuania, Malta, Portugal and Sweden. In the Netherlands, the reproduction right was updated and now applies to owners of neighbouring rights.

However, there are minor deviations between member states maintaining a requirement of fixation and member states granting the reproduction right more unreservedly. Since the reproduction right was naturally already part of all national laws, all member states grant the right against acts of a permanent nature, i.e. acts whereby the work or subject matter is fixed on a permanent carrier. This includes the permanent storage in electronic form. In this regard, only Ireland expressly clarified that electronic and/or digital copying falls within the remit of the reproduction right.

As regards the status of temporary copies, the situation is not necessarily identical in all member states. A major implication here is the interaction between the broad notion of 'temporary' copying under Article 2 and the notion of 'transient or incidental' copies according to the mandatory limitation under Article 5 (1). The Dutch Copyright Act expressly excludes from the scope of the reproduction right temporary reproductions of a passing or incidental nature as defined under Article 5 (1) EUCD. Thereby, the reproduction right as applied to transient and incidental copies is initially curtailed rather than subjected to a copyright limitation.

All other member states have followed the model prescribed under the Directive, whereby such copies are subject to a limitation and thus initially within the remit of the exclusive right. However, the existence of the specific limitation under Article 5 (1) does not necessarily mean that all member states will follow the same broad approach, since the initial description of the reproduction is not uniform.

In a number of Member States, the status of transient copies was undecided and, particularly in academia, debated. This concerned Belgium, Germany, Denmark, Greece, Finland, the Netherlands, France, Poland and Spain. In Denmark, a proposed 1998 amendment to the Copyright Act initially suggested to exclude temporary and ephemeral copies from the scope of the reproduction right, though this was not followed and Article 2 was eventually implemented literally.

In some member states, it was believed that the existing reproduction right already covered temporary acts. Slovakia thus maintains a broad definition of the reproduction right, though the law does not expressly mention transient and temporary copies. Importantly, the law requires that the work is transferred onto a material carrier, which encompasses electronic forms of expression. Similarly, short lived acts of copying were considered covered in Finland and the law is therefore assumed to be in compliance.

Germany included a reference to temporary and permanent copies into the definition of the reproduction right. The status of transient copies was heavily debated prior to the amendment and one particular view was that transient and incidental copies had to facilitate an enhanced or intensified use, which excluded ephemeral copies within the

meaning of Article 5 (1) EUCD. In addition, case law in Germany also indicated that the notion of a right to prohibit the loading of works into computer memory would conflict with a normal use of the work<sup>2</sup>, and should therefore not be covered by an exclusive right. In this regard, it was held that the owner of copyright in a computer program had no redress against a third party loading the program onto multiple work stations. It should be noted, however, that the decision referred to the specific provisions on computer program copyright based on the less certain wording under the Software Directive. It is therefore not certain whether that reasoning may be upheld in view of the amended version of the provision on the reproduction right<sup>3</sup>.

Some member states maintain a more traditional description of the reproduction concept, based on the more restrictive meaning of fixation. This is the case in Hungary and Slovenia, where no express reference to temporary acts of copying was included. The statutory text in Hungary refers to ‘fixation’ rather than reproduction though the provision covers indirect and temporary copies. In Slovenia, the wording refers to a ‘material fixation’ though it is understood that such material fixation may likewise be caused by temporary copies. It is not entirely certain from the wording of the statutory text whether this includes purely transient and incidental copies where a material fixation may be absent. A similar requirement that the copy must constitute a material fixation is also present in France, where the exclusive right requires ‘the *material* fixation of the work by any means that enables its communication to the public in an indirect way’ The French implementation did not alter this and thus the existing debate on whether short lived acts of reproduction may continue, particularly because the statutory text requires a subsequent communication from an eligible carrier; whether that carrier may a temporary representation of the work in digital form is, according to the statutory text, inconclusive. The position in Luxembourg, where the reproduction right was similarly not updated, appears less convoluted. The statutory text refers to ‘the author’s exclusive right of reproducing his work in any manner or any form’ though the text does not specify a right against the making of temporary copies. Poland also maintained the traditional definition according to which reproductions are defined as the ‘creation of copies’. According to doctrinal opinion, this would exclude transient copies on the basis that such copies are necessary stages for purposes not infringing copyright (such as reading)<sup>4</sup>.

The common law jurisdictions likewise require that an infringing copy must be sufficiently fixed. There are, however, differences between the UK and the Irish text. In

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<sup>2</sup> District Court Mannheim [1999] Computer und Recht 668, which held that the simultaneous running of a computer program from a central server on various connected workstations constituted a normal use of the program

<sup>3</sup> Article 4 a) states that the author of a computer program has an exclusive right to authorise the leading and running of a computer program only if it requires the making of a copy (‘Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the right holder’). It follows that the meaning of when such acts constitute reproductions is more open in Member States that have literally implemented Article 4 a) of the Software Directive.

<sup>4</sup> See *supra*, Report on Poland, **XXIIA.I**, pp. 379.

the UK, the concept of copying expressly covers temporary acts<sup>5</sup> (such as loading a work in electronic form into computer memory) and the concept of fixation, according to case law, likewise covers any representation of a work, whether permanent or temporary<sup>6</sup>. Irish law follows a similar pattern; here, the statutory text was updated so as to encompass both the storage of works in electronic form and the making of transient copies on networks.

In conclusion, whereas some member states grant the right in accordance with Article 2, others continue to employ the traditional notion. The core problem this will cause is not only a deviating approach to temporary reproductions but also a potentially inconsistent interpretation of Article 5 (1). The existence of a limitation on ‘transient or incidental’ copies may, of course, be interpreted so as to denote that the limitation presupposes the existence of a right to prohibit all forms of transient and incidental copies as part of the reproduction right. However, the contrary view may prevail: Alternatively, the view may be taken that the scope of the reproduction right, notwithstanding the presence of the limitation, is to be established from the outset and in accordance with the national statutory text describing the exclusive right. Inevitably, this may cause deviating interpretations of Article 5 (1).

## II. *Communication to the public*

The right of communication to the public prescribed by Article 3 EUCD has been transposed either following the implementation of the Directive or previously as a consequence of accession to the WCT and WPPT<sup>7</sup>. It is present in all member states. There are no significant deviations although some differences can be ascertained as regards some technicalities of implementation, but more importantly concerning the exact scope of the right.

In relation to the technicalities of implementing Article 3, the right was incorporated into national laws either as a subset of existing communication rights or, in the case of Belgium and France, was considered to be covered by the existing presentation rights. In France, the existing representation right was thus left unchanged and continues to cover ‘the communication of the work to the public by any means, namely by public recitation, dramatic performance, public presentation, public screening and transmission of the broadcast work in a public space and by broadcasting’. In Belgium, the existing broad communication to the public right likewise was deemed to be compliant and acts of making available had previously been considered covered<sup>8</sup>. In all other member states,

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<sup>5</sup> Sec. 17 (6) CDPA, which applies to all categories of works including computer programs.

<sup>6</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc. v. Gaynor David Ball and others* [2004] EWHC 1738 (Ch); *Sony Computer Entertainment Inc. v Owens* [2002] EWHC 45.

<sup>7</sup> Some member states were already members of the WIPO Copyright Treaties 1996: Cyprus (4.11.2003); Czech Republic; Hungary; Latvia; Lithuania; Slovakia and Slovenia (6.3.2002);

<sup>8</sup> *Cf. Civ. Bruxelles (cess.)*, 16 octobre 1996, *Auteurs et Média*, 1996, p. 426, confirmé par Bruxelles, 28 octobre 1997, *Auteurs & Média*, 1997, p. 383 (‘Central Station’).



the right forms part of the more detailed catalogue of communication to the public rights and was implemented as a stand alone right.

In relation to the scope of the right, one current uncertainty concerns the extension of Article 3 to subsequent acts following the act of making available. In general, it is debated whether the right is granted only up to the stage of making a work or other subject matter passively available to the public, or whether the right owner may also exert control over a subsequent act of transmitting the work to a recipient. The debate emerges from the fact that Article 3, following Article 8 WCT<sup>9</sup> and 10 WPPT<sup>10</sup>, may be interpreted to only cover the act of making available or in the sense of granting a general communication to the public right under which the ‘making available’ constitutes only one element.

In this regard, Austria has implemented the making available right only without referring to a general communication to the public right<sup>11</sup>. The effect here is arguably to cover only the first stage of public communication, for instance by uploading a work onto an internet file sharing platform, but to exclude any liability for subsequent acts of transmission in the process of downloading that work. Thereby, Austrian law recognises the public communication right only as covering one act of ‘making available’. It follows that a person downloading a work cannot be held liable under Article 3 as implemented. Consequentially the act of making a copy in such circumstances can be subject to specific limitations on the reproduction right<sup>12</sup>, in particular as regards existing private copying exceptions.

Conversely, in Member States where the provision was transposed more literally, the issue whether Article 3 (following Article 8 WCT<sup>13</sup> and Article 10 WPPT<sup>14</sup>) encompasses two distinct acts might still be subject to debate. Here, an act of initiating the download of a protected work may form part of a general communication to the public right. However, this depends on whether Article 3 stipulates a general transmission right that would extend to a subsequent transmission, i.e. the transmission from, for instance, a website to a receiving computer. Practically, this means that initiating a download forms part of a transmission process additionally covered as a distinct act of communication to the public. Article 3 mentions, in general, a right to communication to the public, though traditionally such right is understood to require a simultaneous transmission to a public present at the same time and place. Alternatively, the communication to the public limb under Article 3 may be interpreted more broadly to encompass non-simultaneous transmissions. In this case, the reference to the making available of works in an interactive manner may be understood not as a right restricted to such acts, but as an

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<sup>9</sup> See *supra*, Report on Austria, **IIIA.II**, pp. 108.

<sup>10</sup> See the decisions by the Austrian Supreme Court in “APA-Bildfunknetz”, 4.7.1994, [1995] *Medien & Recht* 143 ff.; “Internet News Agency I”, [2001] *ÖBl.* 220; „C-Villas“ [2002] *GRUR* 452), where both the right of reproduction and communication to the public were applied to acts of interactive making available. OGH 17.12.2002 – “Metadodata” [2003] *Medien & Recht* 35 left the precise categorization of exclusive rights to forms of internet communication open.

<sup>11</sup> See, for that view, Reinbothe/von Lewinski, *The WIPO Treaties 1996*, p. 337.

example of acts that fall under any form of a communication to the public, whether interactive or not; in this case, the reference would be of a more declaratory nature.

There is very little case law on the issue. A German court recently held that the communication to the public right covers acts of both streaming of protected broadcasts<sup>12</sup> and, according to another decision, making available of protected newspaper and journal articles.<sup>13</sup> A French court expressly excluded the act of downloading from the scope of the communication to the public right in a case concerning peer to peer file sharing<sup>14</sup>, thereby indicating that the French presentation right does not cover acts of the subsequent transmission to the user. Likewise, the upload and offering of musical works and films on peer to peer websites was qualified as making available to the public in two Norwegian decisions, one of which also asserted that linking to file sharing web sites constituted an act of contributory infringement<sup>15</sup>. In a Swedish decision, the question whether the act of downloading movies from a file sharing platform constituted an infringement of the reproduction or public communication right was left open, although a criminal sentence was imposed<sup>16</sup>.

The situation in the common law jurisdictions is complicated by the fact that Internet transmissions have previously been perceived as falling within copyright protection for cable programmes<sup>17</sup>.

Ireland maintains such protection but has transposed Article 3 partially under a general concept of a dedicated Internet transmission right<sup>18</sup>. That right, implemented in 2000, refers to the making available of works in on-demand services and is restricted to interactive forms of communication<sup>19</sup>. In addition, cable program operators are given an exclusive right in their cable programs<sup>20</sup>, which extends to the contents included in such cable program. The UK, in contrast, repealed the statutory provisions on cable programmes, but implemented Article 3 by distinguishing between broadcasts and other forms of making available. Before implementation, the UK granted protection to cable program services, and protection extended to any information included in a cable program irrespective of whether the contents were protected by copyright<sup>21</sup>. The

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<sup>12</sup> In relation to broadcaster rights: see OLG Hamburg, 8 February 2006, 5 U 78/05 – ‘Cybersky’.

<sup>13</sup> OLG Hamburg, 24 May 2005, 5 O 62/04.

<sup>14</sup> High Court Le Havre, 8 December 2005 (*SACEM, SDRM v anon.*). The case concerned criminal proceedings in which two French collecting societies adjoined as civil parties.

<sup>15</sup> Supreme Court Oslo, 31 March 2005; Oslo District Court, 14 July 2005.

<sup>16</sup> Västmanland District Court, 1 December 2005.

<sup>17</sup> See the decision in *Shetland Times v Dr Jonathan Will* [1997] FSR 604.

<sup>18</sup> See Report on Ireland, **XIVA.11**, pp. 268

<sup>19</sup> Sec. 40 Copyright Act Ireland.

<sup>20</sup> The information contained in a cable program thus constitutes the object of copyright protection. On the effects for non-interactive internet and network transmissions, see the UK case of *Shetland Times v Dr Jonathan Wills* [1997] FSR 607, where it was held that the internet, for the purposes of the – then – similar UK provisions on copyright in cable program services constituted a cable program system. This was followed in *Sony Music Entertainment (UK) Ltd v Easyinternetcafe Ltd* [2003] EWHC 62; [2003] F.S.R. 48.

<sup>21</sup> Thus, a publicly accessible internet web site constituted a cable program service protecting any electronic data included therein:

provisions on cable program protection were thus replaced with a distinction of copyright protection against communication to the public, including the making available of works, and additionally to grant a right in broadcasts. The decisive feature of broadcasts is that an interactive element is absent<sup>22</sup>. In addition, copyright is granted, as such, to any broadcast including the content<sup>23</sup> in the form of any visual images, sounds or information thus transmitted. The effect thus is that non-interactive forms of communication will be classified as broadcasts, which in turn renders the person initiating that communication the maker of a broadcast who enjoys copyright protection in the content of the broadcast. The subject matter of protection is the transmission. Broadcasts are defined as transmission of visual images, sounds or information. This expressly includes internet communications transmitted simultaneously. Hence, where a work is communicated by way of streaming, the making available right is not affected, because the act is classified as broadcast. The difference lies in the scope of protection afforded to broadcasts. The law thereby grants protection to any electronic transmission of a broadcast character, irrespective of the nature of information transmitted. The UK, thereby, recognises a specific right protecting web casts and other internet services that are not interactive.

The situation in Ireland is, conversely, uncertain given that the provisions on copyright protection for cable program services continue to apply. Here, the right of making available affects interactive electronic transmissions provided protected subject matter is made available, but a right in the transmission as such may alternatively be claimed if the process of transmission is cumulatively considered a cable program service.

The difference between the common law copyright jurisdictions and the jurisdictions following the *droit d'auteur* tradition lies in the extension of copyright protection, which in the case of non-interactive transmission is granted irrespective of whether copyright subsists in any work or subject matter communicated. Thus, any act of a non-interactive nature automatically triggers copyright protection. The second difference lies in the definition of broadcasts, which in the UK now apparently extends to transmissions by wire<sup>24</sup> (i.e. on the Internet).

### **III. *Distribution Right***

The situation as regards the distribution right is particularly difficult. Differences can be observed both as regards the definition of the act of distribution and, more importantly, whether the distribution right can extend to copies not incorporated in a tangible article (Recital 29). This includes any copy made by a user that had been downloaded even if this act merely replaces the purchase of a tangible copy. The Directive thus expressly excludes from the distribution right any issuing of copies by way of transmission. Exhaustion cannot occur in these cases since such acts are to be considered acts of

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<sup>22</sup> See Sec. 20 CDPA 1988. See, in more detail, Report on the UK, **XXVIII.A.II**, pp. 441.

<sup>23</sup> Sec. 6 (1), 6 (1A) CDPA 1988, in conjunction with Sec. 20 (2) (a) CDPA 1988.

<sup>24</sup> See Article 3 (f) of the Rome Convention.

communication (Article 3 (3)). It can be observed, however, that not all member states follow an identical definition of the distribution right.

At the national level, the distribution right either existed as a stand-alone right, as part of a broader right of making works available to the public (such as the '*openbaarmaking*' concept in the Netherlands) or as part of a broad umbrella right such as the French and Belgian destination right. In Belgium, the law was changed and now includes a specific distribution right. In the UK and Ireland, the right is formulated as the right to issue copies to the public. The Czech Republic refers to the 'making available of works in a tangible form'. Of the member states which define the right of distribution under a stand alone provision, some differences exist. First, there are considerable differences in the terminology used as far as the scope of the distribution right is concerned. Some Member States (Austria, Czech Republic, Germany and Finland) expressly cover the offering of 'copies to the public'. In German law, therefore, the distribution right is infringed once an individual offer is made to any member of the public. The meaning of 'the public' is therefore wider than in relation to non-physical acts of communication to the public. In other Member States, a broader formulation is given, under which only the act of putting into circulation is covered. This is, for instance, the case in the UK where the term 'distribution' is absent from the statutory text and instead, as noted, a right of issuing copies to the public is granted. In Germany, the act of distribution is defined as the right to 'offer to the public or to put into circulation' the original or copies of the work.

As regards the implementation of the exhaustion principle under Article 4(2), all member states contain a restriction on the respective distribution right following the first sale of a physical copy. However, an express clarification that the exhaustion rule applies only to physical copies (copies in a tangible form) was introduced only in Belgium, France and Italy, the only member states where, consequentially, exhaustion is expressly limited to tangible copies in accordance with Article 4(2) and 3(3) and Recital 29.

In a number of member states where the distribution right is considered a stand alone right, the legislative text defines distribution as act involving, in addition to additional rental and lending right, the 'by sale or otherwise', as required by Article 4 (2). This is the case in Austria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, Greece, Latvia, Norway, Poland, Portugal, Slovakia, Slovenia and Sweden. The German Copyright Act, similarly, requires an act of sale but does not mention an act by which property in a physical carrier is transferred. In Belgium, France, Italy and Spain the specific exhaustion rule was limited, in accordance with Article 4 (2) and Recital 29 to the transfer of property in the copy by sale or otherwise. In the Netherlands, a new provision was included specifically complying with the European exhaustion concept and applying to tangible copies only.

As regards the application of the exhaustion rule beyond the distribution right, it should be mentioned that an application of the exhaustion principle to other exclusive rights by

way of analogy is not expressly excluded. In one decision, the German BGH applied the principle to acts of cable casting, i.e. to a communication to the public right<sup>25</sup>, though in a more recent case this was rejected in an obiter dictum and thus the concept of exhaustion only applies in the context of the distribution right<sup>26</sup>. However, the BGH also established that the exhaustion rule can be extended towards a more general principle. Accordingly, the reproduction right was held not to extend to reproductions of goods in advertisements<sup>27</sup>.

Therefore, there is a certain lack of harmonisation as regards the status of downloadable copies. A recent German decision where the effect of the exhaustion rule as regards a computer program purchased via download was at issue evaded a more detailed analysis of the applicability of the exhaustion rule to downloaded works<sup>28</sup>. Here, exhaustion may occur if it is recognised that the act of downloading a work, under a contract, constitutes either a sale of the work or another act of putting into circulation. The court thereby not only evaded the question whether exhaustion might occur in cases where the work was acquired in a non-tangible form, but also whether the third party acquirer would have to be qualified as a lawful user within the meaning of the Software Directive. In a different recent decision, the opposite conclusion was reached. Accordingly, the exhaustion principle was held to apply in relation to previously acquired software if the work had been transferred for permanent possession of the purchaser and acquired by way of download. The court reasoned that the means of acquiring the software previously purchased from third parties constituted a contract for the sale of goods. The court applied the exhaustion rule as applicable to computer programs by way of analogy. It also declared that any terms and conditions stipulating a prohibition on the (first) purchaser to resell and otherwise distribute such copies violated the mandatory exhaustion principle and was void<sup>29</sup>. It should be noted, however, that both decisions concerned the specific rules on software protection and not the general exhaustion rule under German law. Strictly speaking, the decision is outside the scope of the Directive but the underlying rationale may likewise apply to all other works. The issue whether exhaustion can occur in such instances is, thereby, not entirely transparent.

Further problems can be ascertained with regard to the principle of community exhaustion. Three Member States do not yet recognise that principle (Czech Republic, Lithuania, and Slovakia).

In Denmark, specific rules pertaining to the exhaustion of the rental and lending continue to apply<sup>30</sup>. Denmark also changed the geographic scope of the exhaustion rule

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<sup>25</sup> BGH GRUR 1981, 413, 416 – *Kabelfernsehen in Abschattungsgebieten*

<sup>26</sup> BGH GRUR 2000, 699, 701 – *Kabelweitersendung*

<sup>27</sup> BGHZ 144, 232 – *Parfümflakon*

<sup>28</sup> OLG München, 3 August 2006, 6 U 1818/06. The issue was whether the subsequent sale of ‘used’ computer programs through a website violated the distribution right. The court did not consider whether the specific rule applicable to the distribution of computer programs could be applied to acts of online sales by way of analogy.

<sup>29</sup> LG Hamburg, 29 June 2006 – 315 O 343/06.

<sup>30</sup> Article 19 (3) Copyright Act Denmark.

from international exhaustion within the territory of the EU and EEA Member States. However, Denmark maintains international exhaustion as regards the subsequent rental and lending. Rental and lending rights are exhausted upon the first sale or other transfer of ownership by the right holder or with his consent *regardless* of where the sale/transfer has taken place (international exhaustion). Hence, importers into Denmark from outside the EU and EEA now require consent for further sales, whereas the subsequent rental and lending of such works does not.

The European Court of Justice, as regards the geographical scope of the exhaustion rule, has confirmed that Member States are not at liberty to extend rules on exhaustion towards international exhaustion. It thereby maintained that Article 4 (2) and Recital 28 EUCD are mandatory<sup>31</sup>.

In the remaining Member States, the principle of community-wide exhaustion applies in conformity with Article 4 (2) EUCD. However, there are apparent deviations as to the scope of how the distribution right can be restricted by way of licenses or contractual terms. For instance, Ireland expressly recognises that exhaustion is subject to the terms of a license. Likewise, there is no member state where restrictive licenses are explicitly not permitted. Thus, if a licensor is permitted to restrict the scope of uses, and thus to limit the effects of the exhaustion principle, the central complexity pertaining to the effect of such restriction remains, i.e. the question whether such restriction can have absolute and binding effect or whether they have a relative effect as between the parties to the contract only. In another German decision, it was held that a contractual restriction of a licensee to certain defined product markets had no effect on the occurrence of exhaustion. Hence, exhaustion occurs regardless of the right to subdivide licenses, either to certain product markets or to certain geographical areas<sup>32</sup>.

In addition, Article 4 (2) EUCD does not fully clarify when (i.e. at which market level) exhaustion occurs. Although it is certain now that any placing of protected articles onto the end consumer market causes the distribution right to be exhausted, the legal position is not entirely clear with respect to distribution agreements in relation to different market levels. Here, the respective formulation of the exhaustion rule in different Member States might cause inconsistencies. If exhaustion is prompted by any 'sale' (i.e. transfer of property in the carrier), the control rights of the copyright owner immediately terminate once such transfer is concluded. Conversely, in Member States where a sale etc. is not as such required, the occurrence of exhaustion depends on the respective interpretation of the 'market', which might well restrict the exhaustion rule to the end consumer market. The position is particularly intricate in the UK where secondary rights, in particular the right to object to the import of an infringing copy, exist. If exhaustion were only to occur once the product is physically handed over to the end consumer, the respective imported copy may be infringing<sup>33</sup>.

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<sup>31</sup> *Laserdisken v Kulturministeriet*, Case No. C 479/04, 12 September 2006.

<sup>32</sup> BGH, 6 July 2000, I ZR 244/97 [2001] GRUR 153 – *OEM Software*.

<sup>33</sup> See Report on the UK, **XXVIII.A.III**, pp. 442.

## B. Exceptions and Limitations

The following chapter addresses the implementation of Article 5. Article 5 requires only that the limitation on certain temporary acts of copying be implemented. Member states are at liberty to implement or maintain any other limitation enlisted under Article 5(2), which concerns limitations on the reproduction right, and Article 5(3) covering limitations on both the reproduction and communication to the public right.

The chapter will specifically deal with those limitations under the Directive that appear particularly significant for the use of works and other subject matter in a digital environment. Particular emphasis is placed on the limitations concerning private copying (reprographic and digital copying), reproductions made by certain institutions such as libraries and archives, limitations for the purpose of certain educational uses and limitations concerning the media.

The legal traditions of Member States with regard to copyright exceptions and limitations vary considerably. This variation essentially, though not exclusively, depends on whether a Member State perceives copyright as a civil law based author's right (*droit d'auteur*) or rather a common law based copyright. This has consequences, *inter alia*, for the system of limitations and consequential remuneration. For example, almost all Member States of the *droit d'auteur* tradition operate a levy scheme for private copying. In the UK and Ireland, by contrast, no general private copying defences apply, and levy schemes do not exist, apart from the extended licenses concluded between certain establishments and collecting societies on the basis of individual agreements.

In all but three member states, provisions relating to the interface between limitations and contractual agreements are absent, denoting that derogations from copyright limitations are permitted as a matter of freedom of contract, or are subject to judicial review on the basis of legal principles outside of copyright law, in particular on the basis of consumer protection laws. Portugal maintains that limitations are mandatory as such and cannot be waived by contractual agreement<sup>34</sup>. Here, any such clause in conflict with a limitation is considered void. Belgium generally considers limitations to be mandatory but permits derogations in cases of contracts relating to works made available in interactive services<sup>35</sup>. In Denmark, limitations may be derogated from in bilateral agreements, provided the agreement expressly provides so. Terms and conditions imposed unilaterally in standard contracts constraining limitations are, however, not permitted<sup>36</sup>. It should be noted that these provisions refer to the use of works in the absence of applied technological protection measures. Whether the mandatory nature of limitations and exceptions has an effect on the exercise of rights in case where technological protection measures have been applied is a different matter.

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<sup>34</sup> On Article 75 (5) of the Portuguese Copyright Act see Report on Portugal, **XXIIIB**, p. 393

<sup>35</sup> See Report on Belgium, **IVB**, pp. 121.

<sup>36</sup> See Report on Denmark, **VIIIB**, pp. 159.

## I. *Transient Copies*

The provision on transient copies (Article 5(1) EUCD) was implemented literally in almost all Member States and with minor deviations in terminology in Belgium<sup>37</sup>. In the Netherlands, Article 5 (1) was not implemented as a limitation, but as a general ‘carve-out’ from the scope of the exclusive right of reproduction.

There exist, however, ambiguities in the scope and understanding of the limitation. Article 5 (1) excludes certain temporary or transient copies which have an exclusively technical function. In a number of Member States, the term ‘reproduction’ means a fixation of the work. In these Member States, additional problems may arise with respect to classifying temporary or ephemeral copies as fixations. As will be explained in more detail below, this problem may be more prominent in relation to technological protection measures in the common law jurisdictions.

Another aspect of Article 5 (1) EUCD concerns the question of the correct addressee. Article 5 (1) exempts both copies made for the purpose of mere conduit and copies made falling under the lawful use limb. This may give rise to deviating interpretations. ‘Lawful use’ may be understood either so as to refer exclusively to intermediaries (thus exempting only transient copies made in accordance with the liability provision under Articles 12 – 14 of the Electronic Commerce Directive<sup>38</sup>) or that it is understood as more generally referring to any transient copy made by *any* lawful user. Likewise, the provision may be understood differently as regards the duration of such copies, for instance in relation to more durable (electronic) copies made in computer memory<sup>39</sup>.

In Germany, it was proposed to extend Article 5 (1) EUCD, as implemented, to apply to the specific provisions on computer programs and databases (i.e. the database *sui generis* right) by way of analogy<sup>40</sup>.

A Swedish court recently opined that Article 5 (1) EUCD, as implemented, does not apply to certain technologies such as scanning. The court took the view that temporary copies made in the process of converting news articles into a digital format were not exempt in accordance with Article 5 (1). The copies were not considered to constitute an *integral* part of a technical process. It also held that, because the process of copying was not initiated by a machine (i.e. automatic) but by a person such copies were outside Article 5 (1) EUCD<sup>41</sup>.

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<sup>37</sup> See Report on Belgium, **VB.I**, pp. 139.

<sup>38</sup> In this case, an intermediary may be held liable, arguably, if Article 5 (1) covers the reproduction in question as a matter of copyright and if, in addition, the complementary liability provisions under the Directive on Electronic Commerce (especially Article 12 (3)), in particular as regards the knowledge requirements, are fulfilled.

<sup>39</sup> This is favoured, for instance, by the leading Austrian commentary. See Dillenz/Gutmann, *Urheberrecht, Kommentar* (Vienna 2005), § 41a UrhG annotation 5.

<sup>40</sup> See Dreier/Schulze, *Urheberrecht, Kommentar* (Munich 2005), § 44a annotation 18.

<sup>41</sup> District Court Stockholm, Decision of 14 August 2004 – *Danske Dagblades Forening v Infopaq Sverige AB*.



## **II. *Limitations on the Reproduction Right***

More striking deviations can be ascertained as regards the private copying exceptions under Article 5 (2) (a) and 5 (2) (b) EUCD.

A general and overarching private copying exception exists in the Czech Republic, Finland, France, Germany, Greece, Hungary, Luxembourg, the Netherlands, Norway, Poland and Sweden. Private copying exceptions exist in all Member States but the United Kingdom and Ireland.

Specific separate provisions in relation to reprography and other modes of non-digital copying are present in Austria, Belgium, Cyprus, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain. In some Member States reprography generally encompasses photocopying only (Finland, Italy and Slovenia), while some other Member States provide for specific provisions on photocopying.

In all other Member States, the distinction between reprographic forms of copying and other forms of copying has not fully been recognised, though the limitations in place comply with the Directive.

All Member States except for the UK and Ireland thereby permit the making of copies on paper or similar media, which roughly excludes copies made by digital means. The terminology used and the structure of the pertinent provisions in national copyright laws differs.

### ***Reprographic Copying***

The treatment of the reprographic copying exception in Article 5(2)(a) reveals multifaceted solutions in member states. Article 5(2)(a) permits any reproduction on paper or similar analogue carrier. It is a condition that right holders receive fair compensation.

Private acts of copying by way of reprographic technologies are permitted in all member states but in the UK and Ireland, where, however, certain institutional defences apply for establishments such as public libraries, which are subject to prevailing licensing agreements. In some member states, the limitation has been newly introduced under a separate provision, whilst in others reprography forms part of a wider private reproduction limitation. Differences can be ascertained, predominantly, as regards the types of subject matter that may be used, the medium to be employed and the scope of personal uses permitted, and here in particular whether legal entities are covered as beneficiaries. Additionally, some member states expressly permit third parties to make such copy on behalf of beneficiaries, and in relation to those member states the ensuing question arises whether such third party may be legal entities, and whether such entities may also pursue commercial aims. Article 5(2)(a) does not expressly limit the limitation to copies made by a natural person.

## **Overview**

A reprography exception exists as a sole standing limitation in Belgium, Cyprus, Estonia, Hungary, Italy, Latvia, Malta, the Netherlands, Portugal, Slovakia and Slovenia.

Conversely, no or marginal changes to the law have been made in a number of other member states where reprographic copying is part of the wider traditional private reproduction limitation. As regards photocopying, the Nordic countries continue to employ an extended collective licensing scheme governing photocopies made for private purposes in certain establishments such as libraries. The decision in Austria, the Czech Republic, France, Germany, Greece, Luxembourg, Poland and Spain was to leave the existing private copying limitations intact as a general scheme, and hence the law was not modified as regards the general permissibility of reprographic copying. The systematic approaches vary, specifically with respect to more detailed aspects such as subject matter, beneficiary and involvement of third parties. Thus, the general and traditional concepts of the respective pre-existing private copying exceptions continue to apply concurrently to copies made on paper. These concepts are divergent in scope and discussed below in the context of Article 5(2)(b), especially as regards the Czech Republic, France, Poland and Spain where the distinction between analogue and private copying made under the Directive was not adhered to. Austria and Germany have introduced specific and more generous provisions as regards reprographic copying.

## **Subject matter**

The subject matter covered varies in that some member states restrict copies to fragments of works or certain subject matter. Necessarily, literary works are covered in all member states though certain conditions apply. For instance, reprographic copying is only permitted in relation to fragments of works or small portions of books (Belgium, Lithuania, the Netherlands) or to certain press articles (Netherlands). Artistic works are expressly covered in Austria, the Czech Republic, Germany, Cyprus and Latvia. In Belgium and Lithuania, illustrations from books may be used. Italy, conversely, only allows reprographic copying of literary works. Specific reference to news articles is also made in Austria and Germany.

Notations (sheet music) have been excluded in all member states but in Lithuania and Poland.

## **Mode of Copying.**

The requirement under Article 5(2)(a) that the copying must be made on paper or a similar medium is present in all member states where specific provisions apply. This includes copies made by hand and would normally also include carriers such as microfilm, microfiche etc. Greece restricts this – traditionally – to copies made on paper only. In Italy, copies made by hand or by a means of reproduction unsuitable for

marketing or disseminating the work in public are mentioned. In Germany, the general private copying exception applies, as regards non-digital reproduction both copies made on paper and copies made using analogue reproduction technologies.

### **Personal Uses and Purposes Covered.**

There are significant deviances as regards the purpose for which copies may be made. Article 5(2)(a) does not mention any specific purpose. This suggests that in those member states which continue to employ a general private copying exception, the scope may be restricted, as regards copies made by natural persons, to private (i.e. domestic) uses rather than other personal purposes such as scientific uses. Thereby, the scope of Article 5(2)(a) was aligned with the general private copying exception under Article 5(2)(b) in Hungary and thus restricted to private and non-commercial uses.

In Germany, the issue whether the use must be private (domestic) or whether it may cover other purposes depends on the type of the limitation. Hence, any analogue copy or copy made on paper is permitted in case these are made for purely private uses; for uses exceeding the strictly private sphere, a limited number of copies from published works and from journals and newspapers may be made. In addition, reprographic or analogue copying is safeguarded for a variety of distinct personal uses, such as own scientific purposes, inclusion in a personal archive, for information on current events and any other own use.

### **Beneficiaries**

A similar cause for deviating practices is the uncertainty surrounding the status of legal entities as beneficiaries. Since Article 5(2)(a) is not expressly restricted to natural persons, there are overlaps with limitations concerning reproductions made in establishments such as libraries or educational establishments. This will be further explored below in the context of specific limitations applying to establishments, but it should be noted that the approaches vary – some member states perceive reprographic copying in public establishments as a limitation for the benefit of a natural person pursuing certain objectives whereas in other member states the establishment itself is perceived as beneficiary. It is a different matter, however, whether commercial entities are entitled to benefit from the limitation. In Austria and Slovakia, copies may expressly be made by a legal entity. In Germany, legal entities may rely, as regards reprographic and analogue copying technologies, on certain more detailed provisions within the realm of the private copying limitation, such as the inclusion of materials into an own archive or the making of copies for information on current events. In these cases, it is immaterial whether the legal entity in question pursues commercial aims.

In Italy, Greece and Slovenia, in contrast, organisations and legal entities are expressly excluded and the copy must only be made by a natural person.

## **Copies made by Third Parties**

Whether a third party may be employed is an issue likewise not uniformly addressed in member states. Italy expressly excludes any third party, as is the case in all member states where the copy must be made by a natural person.

Third parties may expressly make reprographic copies upon request of a beneficiary in Austria, the Czech Republic and Germany, which in the case of reprographic copies also covers commercial entities. In Germany, third parties may only be used if the service provided is restricted to a pure mechanical assistance, and only in relation to certain academic uses. The second basket will probably also include an express provision on document delivery for scientific purposes to be undertaken by public libraries in relation to certain scientific works, provided that such service is not offered by publishers. Importantly, this will include not only hard copy distance delivery but also the making available of such works in the form of graphic files.

A specific reference to Article 5 (5) was included in Belgium where the limitation is subject to cases not prejudicing the normal exploitation. In all other member states, the applicability of the three step test is subject to whether Article 5 (5) was implemented and is discussed below.

In relation to the fair compensation requirement, a distinction must be drawn between copies made for private purposes and copies made for such purposes in establishments. Most member states currently foresee that compensation for private copying is paid through the existing levy scheme (i.e. levies paid for copying machines). Collective licensing is currently not in operation in Cyprus, Malta and Luxembourg. The Nordic countries and the UK and Ireland provide for general licensing agreements as regards photocopying.

### ***Private Copying***

#### **Overview**

Article 5(2)(b) restricts the options of member states to introduce general private copying exceptions as regards copying on digital media or through digital reproduction technologies to purely private uses in the sense that the use must be domestic. This excludes any further 'personal' use going beyond domestic uses, which may however be covered by other limitations permitted under Article 5(2) and 5(3). Article 5(2)(b) also requires that the copy must be made by a natural person. Commercial uses, direct or indirect, are likewise excluded.

The responses to Article 5(2)(b) vary. Only very few member states have introduced Article 5(2)(b) as such. As regards the regulatory core of Article 5(2)(b), most member states have either implemented the provision literally or amended the law accordingly.

Therefore, Article 5(2)(b) is reflected in all member states but both the regulatory framework and the details of the scope to which private copying is permitted differs.

Diversities can initially be established between the *droit d'auteur* and copyright systems. The copyright systems (UK and Ireland) permit private copies made of broadcasts (UK and Ireland) and of performances (Ireland only) for strictly private purposes, which fundamentally deviates from the *droit d'auteur* systems in that the purpose is specifically restricted to time shifting. All other systems permit the making of copies for purely private purposes, as is envisaged under Article 5(2)(b), but here additional difficulties appear to have arisen as regards more specific aspects.

In the Czech Republic and Poland, the law remained unchanged and a general exemption applying to all acts of private copying remains in place, only subject to the condition that the purpose must be for personal use. These member states entirely exempt all acts which fall within the ambit of personal use which reflects a broader concept. Likewise, as noted in the context of Article 5(2)(a), France has not introduced Article 5(2)(b) but maintained the traditional private copying exception. In Austria and Germany, more specific amendments to the general private copying concepts were introduced and the law in these member states now makes a general distinction between analogue and digital private copying and to introduce specific rules on copying for personal uses exceeding domestic uses.

All member states – with the exception of the UK and Ireland - thereby provide for an exception which is identical to the core regulatory concept under Article 5(2)(b) in the sense that most acts falling in the ambit of Article 5(2)(b) are included. Article 5(2)(b) was implemented in Austria, Belgium, Cyprus, Denmark, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovakia, Slovenia, Spain and Sweden and permits natural persons to make copies for private purposes and for non-commercial aims, though a number of member states go beyond or restrict that core stipulation.

## **Subject Matter**

Initially, a lack of uniformity as regards the subject matter to which the exception applies can be observed. There are no restrictions as to the classes of works that may be used for the purpose of private copying in most member states. In some member states, the respective private copying exception applies only as regards copies made of sound recordings or audiovisuals works, which is the case in Italy. Specific provisions on home taping (i.e. sound and images) are in place in some Member States such as Italy and the Netherlands<sup>42</sup>. The time shifting defence in the UK and Ireland, as noted, only applies to broadcasts<sup>43</sup>. As for the UK, sec. 70 (1) CDPA contains a defence privileging reproductions made of broadcasts for purposes of time shifting, which has been held

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<sup>42</sup> Third party copying by commercial entities is not permitted in relation to the 'home taping' defence (Article 16b (1) Copyright Act), see Report on the Netherlands, **XXB.III**, pp. 351.

<sup>43</sup> See Sec. 70 CDPA 1988, which was modelled on the US Home Recording Act.

not to apply in relation to commercial activities<sup>44</sup>. It was left open, however, whether the defence may be invoked in cases of copying by third parties which do not pursue a purely profit oriented goal. It was not decided whether the reception of works downloaded from the internet (in this case, sound recordings of undetermined source) by a user was exempt under sec. 70 (1) CDPA, which is deemed to cover 'off air' uses of protected broadcasts for purposes of home recording. It should be noted that the decision at least examined whether the act of downloading fell within sec. 70 (1) CDPA, though as it was decided prior to the implementation, the issue was whether internet communications constituted a protected cable program<sup>45</sup>. The provisions on the protection of cable program services have now been repealed. Sec. 70 (1) CDPA now only applies to broadcasts and can only be invoked in cases of personal and domestic reproductions.

In contrast to the UK, Ireland also permits the private copying of performances by natural persons for private and domestic use. In Estonia, the fair compensation requirement applies to the copying of audiovisual works only.

## Purpose

In addition, there are deviations as regards the scope of Article 5(2)(b) in relation to the purpose of *private* copying. However, the situation is complicated by the presence of certain provisions in some member states that permit, to varying degrees, the making of copies for other personal uses over and above the restrictions contained in Article 5(2)(b). As noted, this initially concerns the Czech Republic and Poland where no restriction to natural persons and private uses is in place and where the law was not amended in this regard. The scope of permissible uses is also more extensive than foreseen under Article 5(2)(b) in Austria and Germany, though here the making of digital copies of works for uses exceeding the domestic sphere was subjected to more specific requirements. In general, both Austrian and German law provide for limitations based on Article 5(2)(b) as far as domestic uses are concerned but the law contains additional limitations as regards uses falling within the broader ambit of 'own uses', and here in particular uses for academic or scientific purposes. This regulatory framework has certain effects, first in relation to the treatment of 'digital copying' for purposes exceeding the private sphere and, especially in Germany, in the context of engaging third parties.

As regards the treatment of digital copies made for personal rather than purely private purposes, the German implementation has drawn a distinction on the basis of the traditional regulation of copying for 'other own uses'. Therefore, legal entities continue to be able to rely on the personal use restrictions if the copies are made for scientific purposes or for acquiring information on current events, and for the inclusion of works in a personal archive. This covers both digital and analogue copies, though the inclusion

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<sup>44</sup> *Sony Music Entertainment (UK) Ltd v. Easyinternetcafé Ltd* [2003] EWHC 62.

<sup>45</sup> See *Shetland Times v Dr Jonathan Wills* [1997] FSR 604.

of works into an archive of a legal entity is only permitted provided such use is non-commercial. Similarly, Austria draws a distinction between domestic copying and other personal uses (such as private research) and legal entities are now not permitted to engage in digital copying. A related area of concern is the extension of the private copying limitations to third parties, i.e. parties which do not pursue any privileged purpose but which act as agents on behalf of beneficiaries. Article 5(2)(b), albeit being constrained to copies made by the beneficiary himself, does not expressly indicate whether member states are at liberty to allow the making of digital copies by third parties. Although the provision only privileges natural persons to make digital copies, a legal entity may rely on the private copying exception provided that its service constitutes some form of agency.

### **Copies Made by Third Parties**

There is a considerable degree of uncertainty regarding the extent to which third parties may be employed in order to facilitate private copying on behalf of a beneficiary. This is reflected in a rather divergent response to Article 5(2)(b).

Member states which have not opted to address the issue will potentially face difficulties in distinguishing between ‘agency type’ situations and situations in which a legal entity provides services on the basis of remuneration, i.e. for direct or indirect commercial purposes. In this case, courts will be faced with the delicate task of distinguishing whether a charge paid for such service constitutes an indirect commercial aim, and, if so, whether this is alleviated if the copy is made upon request by a beneficiary.

A number of member states have expressly excluded any such involvement or have limited this in some other way. It is likewise perceivable that an exclusion of third parties is implicitly contained in the requirement pertaining to natural persons, though it should be noted that this result is not inevitable in case the copy is made upon request by a natural person for qualifying purposes.

An express and general prohibition on third party copying is present only in Hungary. In Italy, the provision of services offering reproductions of sound and video recordings constitutes an infringement of copyright. Third parties may not make copies of sounds and images in the Netherlands. Similarly, the assistance by third parties is unlawful in Norway and Sweden in relation to certain categories, including sound recordings and videograms. In Greece, no express reservation to natural persons is present, and therefore the question whether copies may be made upon request appears undecided. The Greek provision is, however, limited to ‘private purposes’ which is perceived to exclude copies made by third parties for commercial purposes, even if this is done on behalf of a beneficiary. Engaging a third party is permitted in Finland (in relation to literary and certain artistic works only). In Germany, a third party may be involved though this is restricted to non-commercial services if the copy is made for private purposes. If made for further ‘own’ purposes, *digital* copies may be made by third parties

against payment provided the service is restricted to a purely mechanical assistance, i.e. where the third party does not provide additional services. More critically, as already noted in the context of Article 5(2)(a), the current copyright reform in Germany (the ‘second basket’) envisages to permit public libraries to transmit works under a new Article 53a by way of providing online access to articles in an (electronic) graphic file format. The envisaged provision covers all instances of reproductions permitted for private and other personal uses. It is also subject to publishers not offering the same service. The provision potentially exceeds Article 5(2)(b) with respect to graphic files made available upon request, since such files are arguably not to be treated as reprographic files and thus the mode of the reproduction (storage in the beneficiaries computer memory) would not qualify as analogue copying technique, irrespective of whether the user eventually copies the article on paper. There is also uncertainty as to whether the provision of such service prejudices the market of publishers.

### **Legality of the Source Copy**

The question of the legality of the source copy, important in the context of peer to peer file sharing, is not addressed under Article 5(2)(b) and the practice of member states is likewise not identical. Only few member states address the issue; in those member states where the issue was left unresolved, a prohibition to make reproductions from illegal source copies may follow from the application of general principles.

The issue of the legality of the source copy (and, thereby, the initial treatment of file sharing)<sup>46</sup> has been addressed in Finland, Germany, Italy, Portugal, Norway, Spain and Sweden<sup>47</sup>.

In the UK and Ireland, the problem will not arise since a copy that was unlawfully created constitutes an infringing copy, in which case no defence can apply<sup>48</sup>. The position in the UK is that copies made without consent are generally deemed to be infringing. The situation is clear at least with respect to copies made of broadcasts under the time shifting provision. Any copy made in that way will be an infringing copy for any other purpose outside the scope of Sec. 70 (1) CDPA<sup>49</sup>.

A specific requirement that the source copy must be ‘legal’ was introduced in Finland, where an express prohibition on illegal downloading is in place, according to which the copy used must not have been previously made available or created without the author’s

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<sup>46</sup> The issue does not normally arise with regard to UK law. First, because a copy uploaded without authorisation constitutes an ‘infringing copy’ that must not be copied (Sec. 27 (1) CDPA), second, because no private copying defence exists.

<sup>47</sup> Swedish law additionally excludes temporary copies from the lawfulness requirement.

<sup>48</sup> A copy uploaded without authorisation constitutes an ‘infringing copy’ that must not be copied (Sec. 27 (1) CDPA), second, because no private copying defence exists.

<sup>49</sup> Cf. Secs. 70 (2), 70 (3) CDPA 1988.



authorisation<sup>50</sup>. Similarly, Norway requires that the source copy must not have resulted from an infringing act, including circumvention of a technological protection measure.

In Germany, the copy must not be ‘obviously unlawful’, which is to be determined from the perspective of an average user. This has spawned a debate as to how and when the average user is able to assess the infringing nature of a source copy<sup>51</sup>. In addition, a specific provision details that copies made under the private copying exception must not be used for further distribution or made available<sup>52</sup>.

The French implementation did not introduce a specific requirement as to the legality of the source copy but now imposes express sanctions for active participation in file sharing networks. File sharing has thus been specifically dealt with as a stand alone provision in the context of sanctions and remedies, which not only aims to prevent users from file sharing but also sanctions the development of file sharing technologies. A French court has ruled that the unauthorised downloading of files did not constitute a reproduction; the issue of the private copying exception thus did not arise<sup>53</sup>. The French position, according to case law, also indicates that the private copying exception can only be restricted by way of express legislation<sup>54</sup>.

The Spanish law is more restricted in that only lawfully acquired copies may be used. Spain now requires that the person making a copy for private purposes must have obtained the source copy legally or must have had lawful access to it<sup>55</sup>.

## Further Uses

There are some deviations as regards the permissibility of further uses of copies made on the basis of a limitation. In German law, it is prohibited to distribute copies or make such copies publicly available if the copies were made on the basis of the private copying exceptions<sup>56</sup>. Conversely, Finland permits the public distribution and performance of any work made on such basis by way of a mandatory provision.<sup>57</sup>

## Application of the Three Step Test

There are further deviances as regards the application of the three step test to acts covered under the respective private copying exception. With the exception of Belgium and Portugal, the three step test was not implemented as a specific norm directly

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<sup>50</sup> On Article 11 Copyright Act Finland, see Report on Finland, **IXB.III**, pp. 186.

<sup>51</sup> See Report on Germany, **XIIB.III**, p. 246.

<sup>52</sup> § 53 (6) Copyright Act Germany.

<sup>53</sup> High Court of Le Havre, 8 December 2005.

<sup>54</sup> As was asserted in *Stephane P. v Universal Pictures* (the ‘Mulholland Drive’ decision), Paris Cour d’Appel, 2 June 2005. This was, however, overturned on the basis of Article 5 (5) EUCD.

<sup>55</sup> See Report on Spain, **XXVIB.III**, p. 421.

<sup>56</sup> § 53 (6) Copyright Act Germany.

<sup>57</sup> Article 11 (3) Copyright Act Finland.

applicable to the private copying regime, though some member states, as will be discussed, have introduced the three step test as a general norm applicable to all limitations into national law. An express reference to the three step test, as applicable to private domestic copying, has been included only in Portugal.

## **Summary**

In conclusion, all member states therefore at least permit private copying in relation to at least certain classes of works or subject matter, and sometimes the national private copying regime extends to uses exceeding domestic private uses. The main areas of concern relate to two broader issues. As noted, there is uncertainty as regards the distinction between copies made by a legal entity for (indirect) commercial purposes as such and copies made by such third party on behalf of a privileged user. Secondly, the status of the source copy from which a private copy may be made remains a matter of uncertainty.

## ***Libraries, Educational Establishments, Museums and Archives***

Article 5 (2) (c) EUCD was implemented in a number of Member States, according to which Member States may provide for limitations for the benefit of certain publicly accessible establishments. The provision permits limitations on the reproduction right in certain non profit institutions.

	<b>Provision</b>	<b>Scope and applicability</b>
AUSTRIA	Art. 47(2)	Reprographic copies: no restrictions – digital copies: restricted to non-commercial use, source copy must be in possession.
BELGIUM	Art. 22(1) (8)	Educational establishments excluded – limited to number of copies necessary for preservation of cultural and scientific patrimony – no conflict with normal exploitation and no unreasonable prejudice of the legitimate interest of the author - copies are property of museum, library or archive - rightholder is entitled to access to copies, against a due remuneration.
CYPRUS	Art. 7(2)(a); 10 (j)	Copies may not be subject to any payment – includes educational institutions and museums.
CZECHIA	Art. 37 (1)	Library, archive and other non commercial school, educational and cultural establishment – not limited to “publicly accessible” institutions – “cultural establishment” wider than “museum” – reproduction for archival and conservation purposes.
DENMARK	Art. 16, 33	Same wording and scope as article 5 (2) (c) EUCD.
ESTONIA	Art. 20	Restricted to a single copy of the work – source copy must be in possession – purpose of replacing a work that is (in danger of getting) lost, destroyed or unusable – likelihood of such danger if the work is the single one in the collection/archive –

	Provision	Scope and applicability
		purpose of replacing a work which belonged to the permanent collection of another library/archive/museum that is lost, destroyed or rendered unusable – only if acquisition of another copy of the work is impossible
FINLAND	Art. 16, 16a	Limited to archives, public libraries and museums stated in a governmental decree - source copy must be in possession – reproduction for the purpose of: preservation, technical reconstruction and restoration, internal use to maintain the collection (administration and organisation), completing a missing part of a series unless the missing work is available through commercial distribution or communication, enabling the lending out of a copy of a work or a part thereof which is prone to damage.
FRANCE	Art. L-122-5 8°	Educational establishments excluded – reproduction for the purpose of preservation of works or the on site consultation of works.
GERMANY	Art. 58 (2)	Reproduction and distribution of works of art and photographs in catalogues published by public libraries, museums or educational institutions – reproduction for the purpose of public exhibition or documentation of a collection.
GREECE	Art. 22, 23	Restricted to a single copy of the work – museums excluded - source copy must be in possession – reproduction for purpose of retaining the additional copy or transferring the copy to another non-profit library or archive – only if acquisition of additional copy is not possible promptly or on reasonable terms – additional provision for the reproduction of cinematographic works of special artistic value for preservation in the National Cinematographic Archive, subject to permission of the Minister of Culture.
HUNGARY	Art. 35 (4)	Reproduction for the purpose of scientific research in general – if the source copy is in the collection reproductions may be made to supply to another library - books or periodicals: only small parts may be reproduced.
IRELAND	Art. 53-58 and Secs. 59ff.	No implementation of limitation as such - complex regulatory framework with specific types of uses for libraries, archives and more limited: educational establishments, not applicable to museums - use of works by libraries and archives subject to ministerial regulations – no positive right, institutions are perceived as agents for the supply of works under the research and private study exception – only lawfully published works – reproduction for the purpose of replacing lost, stolen, discarded or destroyed works, only if the work cannot be purchased – copies may be made for purposes of security, compiling catalogues, exhibitions – subject to remuneration scheme.
ITALY	Art. 68 (1)	Reprographic reproductions in public and scholastic libraries, museums and public archives for their own services - levy on photocopies made inside the library of works in the collection of public libraries for own services - digital copying is explicitly excluded.
LATVIA	Art. 19 (1)(4); Art. 23	Reproduction of works for the needs of libraries and archives – restricted to a single copy of the work – for purposes of preservation of a particularly valuable work or to replace a copy which has been lost, damaged or become unusable – only when impossible to obtain such a copy in another acceptable manner - the reproduction may only be repeated in separate and mutually unrelated cases - not limited to

	<b>Provision</b>	<b>Scope and applicability</b>
		“publicly accessible” institutions.
LITHUANIA	Art. 21 (1) (2)	Restricted to reprographic copies - work kept in collection - works made available online excluded - reproduction for purpose of preservation or replacement of lost, destroyed or rendered unusable copy - impossible to obtain such a copy by other acceptable means – restricted to a separate single act of reproduction.
LUXEMBOURG	Art. 10 (10)	Purpose of preservation of the heritage - limited to number of copies necessary for preservation of cultural and scientific patrimony – no conflict with normal exploitation and no unreasonable prejudice of the legitimate interest of the author – audiovisual works may be communicated to the public inside the institution, but not digital.
MALTA	Art. 9 (1) (d)	Same wording and scope as art. 5 (2) (c) EUCD.
NETHERLANDS	Art. 16n	Reproductions for the purpose of archiving, restoring or replacing the work in case of imminent destruction, or keeping it consultable when there is no technology available to render it accessible – source copy must be in collection – moral rights have to be taken into account.
NORWAY	Art. 16 [partially]	Libraries are allowed to make copies for purposes of conserving and securing their collections - extended statutory licence for archives, libraries and museums - more specific qualification of this limitation will depend on the contractual arrangements with the right holder's organisation, and no such contract has so far been concluded.
POLAND	Art. 27, 28 (2)	Also applicable to schools – institutions may prepare or commission preparation of copies of disseminated works – reproduction for the purpose of completion, maintaining or preservation of their collections, and for making them available free of charge – no explicit restriction to non-commercial use.
PORTUGAL	Art. 75(2)	Fair compensation of authors and publishers.
SLOVAKIA	Art. 31	Not limited to “publicly accessible” institutions – not explicitly limited to non-commercial use – reproduction for the purpose of replacement, achieving or preservation of the original of the work or of a copy thereof in cases of loss or destruction or damage, or where the permanent collection is being constituted.
SLOVENIA	Art. 50 (3)	Reproduction for the purposes of internal uses – source copy in own collection - reproduction of whole books, graphic editions, electronic databases and computer programs are not, save for specific provisions, permitted – also applicable to reproductions made by scientific establishments.
SPAIN	Art. 37 (3)	Reproduction of works in public ownership or part of the establishments' collection – ‘no gainful interest’ in stead of ‘non-commercial use’ - copies are implicitly non-commercial - educational establishments excluded - reproductions for investigation and preservation purposes.
SWEDEN	Art. 12	No implementation of limitation as such – system of extended collective licenses.
UNITED	Art. 37-44	Only libraries and archives – reproduction by librarians for the purpose of supplying

	Provision	Scope and applicability
KINGDOM		to other libraries, or replacing discarded, lost or destroyed works, and for researcher and private study.

The scope of the limitation differs both with respect to the types of institutions covered, and with respect to the specific purposes the establishments covered may rely upon. One major difference that could be ascertained was whether the institutions are granted the limitation for internal and organisational purposes (such as for making replacement copies or for preservation purposes), or whether it applies with respect to purposes of third parties, for instance for educational or research purposes.

In this respect, the law in Germany only partially reflects limitations applying to the institutions mentioned. Germany does not specifically deal with reproductions made within such institutions but the general private copying clause (as regards certain ‘own uses’) applies, thus benefiting the user rather than the institution. As already mentioned, the ‘second basket’ envisages to introduce a specific provision on document delivery from public libraries, but this will systematically be implemented as an extension of the individual use provisions<sup>58</sup>.

As far as the transposition of Article 5 (2) (c) EUCD as a limitation privileging the institutions mentioned as such is concerned, numerous deviations can be observed. The provision was literally implemented only in Malta and Portugal. In all other member states, the institutions and scope of the respective institutional limitations vary to a considerable degree. In Belgium and Luxembourg, the limitations on institutional uses have additionally been subjected to the an express application of the three step test.

### Institutions Covered

In some Member States, the specific limitations for the purposes of reproduction is governed by an umbrella clause specifically pertaining to the institutions mentioned under Article 5 (2) (c), including Austria, the Czech Republic, Cyprus, Hungary, Lithuania, Norway, Poland, Slovenia and Sweden. In other Member States, the scope is restricted to libraries, museums and archives without addressing educational establishments. This concerns Belgium, Estonia, Finland, France and the Netherlands though here certain more specific provisions are in place dealing with educational purposes as a matter of teaching or research. Libraries and archives only are privileged in Greece, Latvia and Slovakia. In Austria, the respective limitation applies generally to all establishments that have as their purpose the collection of works<sup>59</sup>. In Poland, provisions are in place dealing with libraries, archives and schools, thus excluding higher education

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<sup>58</sup> See § 53a of the proposed amendment, discussed above, IB.II.

<sup>59</sup> See § 47 (2) UrhG-A, see Report on Austria, IIIB.IV, p. 111.

establishments. However, Polish law allows the making of copies in information and documentation centers as well as in schools.

Educational establishments receive special treatment in a number of member states, and in some cases there are overlaps between Articles 5 (3) (a), 5 (3) (n) or 5 (3) (o) EUCD. The respective transposition of Article 5(2)(c) does not extend to educational establishments in Belgium, Estonia, Finland, France, Luxembourg and the Netherlands. Cultural establishments are covered in the Czech Republic.

In a number of Member States, it is a requirement that copies must be made from source copies in possession of such establishment, such as in Estonia, Greece, the Netherlands, Slovakia, Slovenia, and, subject to further conditions, in Ireland and the UK.

### **Purposes**

The nature of the limitation, as noted, is not identical in all Member States. The general conception appears to be that the respective limitation concerns, roughly, the making of copies in the public interest, which usually denotes that institutions may make copies for purposes of preservation, archiving or for replacing existing copies. Again, the scope to which the respective limitations apply differs significantly. In Belgium, Latvia, Lithuania, the Netherlands, Norway, Poland, and Slovakia preservation purposes are expressly referred to. In Belgium and Luxembourg, preservation refers to national heritage, i.e. the copy must be made in order to facilitate broader public policy purposes.

An additional restriction to purposes of replacement of existing copies within a collection can be found in Estonia, Latvia and Ireland.

Archiving purposes are expressly mentioned in Ireland, the Netherlands and the UK. A broader scope is provided in the Czech Republic, where all non-commercial establishments may qualify and a requirement of public accessibility does not exist. In Germany, a specific provision permits the archiving of works, though this is not restricted to the establishments mentioned in Article 5(2)(c).

### **Mode of Copying**

With regard to the modus of copying, most Member States recognise the use of digital copying technology and the copying on digital carriers. In Austria, reprographic copies may be made without any restriction but digital copying is subject to the establishment owning the source and to non-commercial purposes. In contrast, a restriction to reprographic technology exists in Italy, and an additional restriction on copies made on paper exists in Lithuania.

Particular provisions are in place in Finland, where a digital archiving provision and a distance learning limitation, including a limitation on acts of communication to the public, have been introduced.

In Hungary, a debate exists whether the use of works within institutions may extend to intranet uses to allow mutual access to digitised copies held in other establishments such as libraries and archives<sup>60</sup>. In these cases, Member States appear to go beyond both Article 5 (3) (n), 5 (3) (a) and Article 5 (2) (c) EUCD.

## **Summary**

In conclusion, with respect to institutional limitations, no explicit deviation from the Directive can be established in general. In most cases, the inherent overlap between institutional limitations and limitations that may be evoked for other purposes is regulated in a rather diverse way. Necessarily, Member States where a more generous private copying exception exists need not grant extensive limitations for institutional purposes in order to cover the copying for third party scientific or educational purposes. Thereby, a number of aspects covered under Article 5 (2) (c) EUCD may simultaneously fall within the private copying or educational limitations.

It is noteworthy, however, that in some Member States the institutional reproduction limitations are additionally subjected to a compensation scheme based on collective licenses. Specific compensation schemes for institutional copying exist in Italy, where a detailed compensation scheme regarding educational establishments, museums and archives is in operation. Similarly, very detailed provisions concerning the operation of collective licensing schemes exist in Ireland and the UK. In Finland, Norway and Sweden extended collective agreements are in place. In these cases, the ability to rely on the respective institutional copying limitations depends on agreements to be concluded in detail. In Norway, a statutory license is in place. In Poland, copies made in information and documentation centers give rise to a claim for remuneration if the work is reproduced against payment of a fee. In Portugal, the provision is subject to a general fair compensation clause.

Perhaps the most rigid scheme exists in Ireland and in the UK, where copying within institutions is in practice subject to the payment of license fees under individual licensing schemes, since here no private copying exception exists for the benefit of patrons and the research and private study exception does not, as such, allow institutions to make copies on behalf of patrons.

## ***Ephemeral Copies Made by Broadcasters***

Article 5 (2) (d) was transposed, or a similar provision already existed, in most Member States except Austria, Czech Republic, Greece and Slovenia.

The right to make ephemeral recordings varies in Belgium where it is only provided in relation to protected broadcasts rather than all subject matter. The archiving of such broadcasts, as permitted under Article 5 (2) (d) EUCD, is not mentioned in Belgium, though existing archiving limitations may cover such acts.

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<sup>60</sup> See Report on Austria, **IIIB.V**, p. 112.

In France, the limitation only applies to broadcasts. In addition, a rather dissimilar version of Article 5 (2) (d) was introduced which only applies to rights in phonograms and performances, and only to the extent that these were initially intended for broadcasting. Similarly, the respective limitation in Spain only applies.

In Germany, broadcasters may only make ephemeral copies for archiving purposes and copies made under that limitation must be destroyed within a month of the first broadcast. In Spain, a more limited version is in place, restricted to certain broadcast and satellite licenses.

In Denmark and Norway specific agreements and extended collective licenses governing the precise use of such copies by broadcasters exist. In Sweden, currently recordings may be made by broadcasters only if a broadcasting license had previously been acquired.

In Ireland and the United Kingdom, the limitation is restricted to technical necessities of control and supervision of programs. Poland requires a general ‘lawful use’.

In contrast, the Polish implementation allows archiving and preservation beyond those mentioned in Article 5 (2) (d) to fixations made in the course of preparing a broadcasters own programme.

### ***Reproductions of Broadcasts Made by Social Institutions***

Article 5 (2) (e) was implemented in Belgium, Cyprus, Italy, Malta and Portugal. A similar provision existed partially in Denmark, Finland, Germany, Hungary, Ireland and Norway, whereas the copyright laws of Austria, the Czech Republic, Estonia, France, Greece, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom do not recognise specific exceptions.

The institutions covered vary. In Denmark and Finland, the limitations apply more narrowly to works included in radio and television transmissions for certain establishments such as hospitals. However, no compensation is payable. In Norway, social institutions benefit from extended collective licensing schemes.

### ***III. Limitations on the Reproduction and Communication to the Public Rights***

Article 5(3) permits member states to introduce or maintain certain limitations that, in contrast to Article 5(2), may be extended to the communication to the public right under Article 3.

	Provision	Scope and applicability
AUSTRIA	§§ 42 (2), 42 (6)	Single copies for individual (“own”) research purposes - all types of reproduction processes, including digital copies - schools and universities permitted to reproduce for purposes of teaching or instruction in an amount required for a school class or lecture - school textbooks excluded – additional: inclusion of certain published



	Provision	Scope and applicability
		works in collections intended for churches, schools and teaching allowed - school textbooks excluded - fair compensation.
BELGIUM	Art. 22, §1er, 4°bis, 4°ter and 4°quater, 21 §2, 22 §1er, 3°	Separate levy systems for digital/analogue reproductions - reproduction of articles, works of applied art or short fragments of other works - only by photographic technique or a method leading to a similar result – reproduction and communication may not prejudice normal exploitation of the work - communication only allowed by official establishments of education and research, through closed transmission networks of establishment, in the framework of normal activities of establishment - additional: communications carried out ‘in the framework of school activities’ (wider than purpose of illustration for teaching) - additional: statutory licence for including works in an anthology used for teaching, only after death of author, moral rights to be respected, remuneration.
CYPRUS	Art. 7 (2) (5) + (18)	Same scope as Article 5 (3) (a) EUCD.
CZECHIA	Art. 31b, 31c, 35 (5)	During school performances performed exclusively by pupils, students or teachers of school or educational establishment – works created by a pupil or student as school work: use for own internal need – additional: inclusion of small published works in their entirety into an independent scientific, <i>critical or technical work</i> , or work designated for teaching purposes, for the clarification of its content - use of a published work in a lecture exclusively for scientific, teaching or other instructive or educational purposes.
DENMARK	Art. 11 (2), 13, 18, 21, 23 (1)	Extended collective license - teachers and students may as part of educational activities make recordings of their own performances of works - production of anthologies for educational use - remuneration – published work may be performed in public in case of educational activities - use of works of fine art, etc. in critical or scientific presentations - commercial use subject to extended collective license.
ESTONIA	Art. 19(2), 19 (3)	Same scope as Article 5 (3) (a) EUCD - remuneration – additional: reprographic reproduction of articles lawfully published in periodicals and of excerpts from published works for sole purpose of teaching or scientific research in educational and research institutions - additional: public performance of works in immediate teaching process in educational institutions by teaching staff and students, audience consists of the teaching staff and students or other persons who are directly connected with educational institution where the work is performed - non-commercial purpose not explicitly required.
FINLAND	Art. 14 (1), 16(a)-16(d), 18, 21	Copies used for education or scientific research may be communicated through other means than radio or television broadcasting – photocopying excluded – additional: insertion of minor parts of a work or, if not extensive, the whole work, into printed compilation intended for use in education - works made for education and newer than 5 years excluded – publisher of the compilation pays whatever he sees fit to the author – additional: published works, other than cinematographic or dramatic works, may be publicly performed for educational purposes - subject to extended collective license - cinematographic works may be publicly performed in connection with university level cinematographic education - author may prohibit use except for recording of television or radio broadcasts.

	<b>Provision</b>	<b>Scope and applicability</b>
FRANCE	Art. L-122-5, 3° (e)	Communication or reproduction of excerpts of works - works made for educational purposes, sheet music and works made for a digital edition of literary works excluded - public be composed of pupils, students, teachers or researchers directly concerned - remuneration - entry into force only in 2009.
GERMANY	§§ 53(2) (4); 53(2) (3); §52a	Not implemented as such – making available to a limited group of students or scientist of small parts of works, small works and single contributions to journals and newspapers - purpose of illustration mandatory for schools, but not for scientific researchers - remuneration - works designated for school teaching excluded - making available of a film only permitted after two years following its first cinema exploitation - private copying permits the copying of small parts of published works by teachers for uses in schools and other educational establishments, excluding universities - reprographic and digital copying for private individual research purposes under private copying exception – no requirement of indication of source.
GREECE	-- (partially under private copying)	Not implemented as such – allowed to reproduce articles, short extracts of a work, parts of a short work or lawfully published work of fine art exclusively for teaching or examination purposes at an educational establishment - in accordance with fair practice - may not prejudice normal exploitation – public performance within framework of staff and pupil or student activities at an educational establishment, provided that audience composed exclusively of staff, pupils, students, parents or caretakers, or persons directly involved in activities of establishment.
HUNGARY	Art. 34 (2), 35 (5)	Reproduction of excerpts from published literary and musical works to be incorporated into a work - no requirement of non-commercial purpose for educational use, only for scientific research - additional: copying of published books or articles from periodicals for use in schools and universities.
IRELAND	Secs. 53-58	Not implemented as such - copying a literary, dramatic, musical or artistic work or typographical arrangement for purposes of instruction in education – fair dealing for research and private study purposes: acknowledgement is not required., subject to the ‘unreasonable prejudice’ test, right holders who have established a licensing scheme may claim compensation.
ITALY	Art. 68 (1) + (2), 70 (1) + (2)	Not implemented as such - regulates educational concerns only under the limitation on quotations - the reprography exception applies.
LATVIA	Art. 19(1)(2), 21	Not implemented as such - permitted to use communicated or published works or fragments of them in textbooks which are in conformity with educational standards, in radio and television broadcasts, in audio visual works, in visual aids and the like, which are specially created and used in the face-to-face teaching and research process in educational and research institutions - performance of a musical work in educational institutions in face-to-face teaching process with participation of teachers and learners, if audience comprises only teachers, learners and persons directly associated with the implementation of an educational programme – no indication of source required – not restricted to non-commercial purposes.
LITHUANIA	Art. 22(1) (1)	Reproduction of short published works or a short extract of a published work.

	Provision	Scope and applicability
LUXEMBOURG	Art. 10 (2)	Only applies to short extracts of a work.
MALTA	Art.9(1)h)	Same scope as Art. 5 (3) (a) EUCD – additional: translations and distributions.
NETHERLANDS	Art. 16	Work must have been published lawfully - adoption must be in accordance with what might reasonably be accepted under the rules of social custom - moral rights have to be observed – remuneration for educational use - non-commercial: nature of the activity of taking over the protected material is decisive.
NORWAY	Art. 23 (1)	Published works of fine art and photographs may be reproduced for inclusion in a critical or scientific discussion – for inclusion in texts of general educational purpose only photographic may be reproduced - remuneration - does not apply to machine readable form - photographs of persons may be included in biographic works.
POLAND	Art. 29 (2)	Inclusion of disseminated minor works or excerpts from larger works in textbooks, classroom selections and anthologies - remuneration - non-commercial character not explicitly required.
PORTUGAL	Art. 75 (2)(f) + (h)	Indication of source not required.
SLOVAKIA	Art. 25	Not implemented as such, falls under the scope of the quotation exception.
SLOVENIA	--	Not implemented.
SPAIN	Art. 32 (1) and (2)	Reproductions by teaching staff - making available in closed networks – reproduction and loan works for inclusion (i.e. quotation) from fragments of published literary works, audio visual works and sound recordings as well as the inclusion of artistic works such as photographs and works of fine art – regarding journalistic works: author may object and receives remuneration - excludes textbooks and manuals created for educational purposes.
SWEDEN	Art. 18, 23	Reproduction of minor portions of literary or musical works and such works of a limited scope for inclusion in composite work consisting of works by large number of authors - five years from the year in which the works were published or made public - works of fine art may be reproduced in connection with the text - works created for use in educational activities excluded – remuneration. published works of fine art may be reproduced in connection with the text in a scientific presentation.
UNITED KINGDOM	Sec. 29, 35	Same scope as Art. 5 (3) (a) EUCD – additional: educational establishments may make recordings of a broadcast, or a copy of such a recording - communication to the public by a person situated within premises of an educational establishment, only receivable within premises, except when a licensing scheme is in place - reprographic copying from published works, including copies in an electronic form made by any electronic means – additional: specific cases of copying by librarians for purposes of research (i.e. on behalf of the person fulfilling these criteria).

### ***Teaching and Scientific Purposes***

Article 5 (3) (a) on limitations for illustration of teaching and scientific purposes was implemented by a number of Member States. Article 5(3) (a) permits member states to introduce limitations for certain educational and scientific purposes. The source must be indicated if this is possible. The provision limits such uses to purposes of illustration for teaching and research and thus refers to the use of works in educational establishments.

Only Cyprus, France, Latvia, Luxembourg, Malta, the Netherlands and Spain reflect Article 5 (3) (a) EUCD in a single provision, though not all those Member States concurrently permit uses consisting in a communication to the public. Specific provisions expressly dealing with educational and scientific research purposes are absent in Slovakia and Slovenia.

Between those Member States where Article 5 (3) (a) EUCD was implemented, or a similar provision retained, there are significant deviations in detail.

One particular observation, as regards limitations for research purposes, is that different regimes apply which, broadly speaking, make a distinction between uses made by individuals in educational establishments and uses made by the educational establishment for its own purposes. There is, in general, an overlap between Article 5 (3) (a) and additional limitations regulated under discrete regimes, most notably as regards limitations for private ('own') copying purposes. The extent to which such overlaps may cause a disharmonising effect cannot be presented here in meticulous detail. However, the basic reasons for why such overlaps exist should be mentioned.

To varying degrees, a permission to make copies for own scientific and/or educational uses encompasses 'own' educational or scientific purposes. Systematically, such provisions do not fall in the ambit of Article 5(3)(a) because such copies are used for own rather than teaching or instructional purposes, and therefore educational establishments only indirectly benefit from those limitations applicable to uses by, for instance, students.

Copyright limitations that approximately fall within the remit of an extended private copying regime (i.e. for other than purely domestic and personal uses) are in place in Austria, Germany, Greece, Hungary, Italy, Norway and Sweden. In Germany, for instance, copies made for own scientific uses are permitted in addition to a more specific exception applying to copies made for the inclusion into collections for the use in schools and churches<sup>61</sup>. Likewise, a general copyright defence for individual scientific ('research') purposes is applicable in the UK and Ireland, though here reprographic copying by students in universities is subject to additional license agreements subject to a number of detailed additional requirements.

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<sup>61</sup> See Article 56 German Copyright Act.

Necessarily, the more member states extend the notion of copying by natural persons for specific scientific purposes, the less it is necessary to maintain or introduce provision for the benefit of educational institutions as such. In addition, as noted, some member states permit the making of private copies, including copies made for research or educational persons, by third parties<sup>62</sup>, and hence an educational institution may thus be able to rely, over and above the restraints under Article 5(3)(a), on limitations benefiting its own students.

### **Reproductions by Educational Institutions**

In almost all Member States, Article 5 (3) (a) EUCD is thereby covered by a number of provisions dealing with aspects of educational and scientific uses. Apart from differences regarding the additional application of different limitations, deviations as to the uses permitted for the benefit of educational institutions can be observed. Most importantly, this concerns the mode of copying and whether acts restricted under the communication to the public right are covered. Digital copying for teaching and scientific purposes is expressly only referred to in Belgium<sup>63</sup>. Similarly, the Dutch implementation applies to both analogue and digital uses. Restrictions to reprographic copying, conversely, are in place in Hungary. The situation in Germany is different than in those member states where Article 5(3)(a) is more fully reflected as a sole standing limitation for the immediate benefit of educational institutions. The law does not, as far as the reproduction right is concerned, privilege educational institutions in general. Universities may only make copies for examination purposes. Other uses are covered under the limitations for individual scientific uses. Schools may make reproductions, digital or analogue, for educational purposes in schools for teaching and examination purposes<sup>64</sup>. The making of digital copies for the illustration of teaching is thus permitted in schools whereas universities cannot rely on a dedicated exception. The making of copies by universities and other educational establishments for the use by students is permissible, but only to the extent that the copy is made by a university as a third party and if the university makes such copy for the own use of a privileged scientist or student. In this case, and in contrast to the general permission to employ a third party under the private copying exception, it is not required that the copy is made from a copy that is the property of the privileged person<sup>65</sup>.

In all other member states, no distinction between analogue and digital copies was expressly made.

### **Extension to Acts of Public Communication**

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<sup>62</sup> See above, at p. 16.

<sup>63</sup> See Report on Belgium, **IVB.VII**, p. 125

<sup>64</sup> Article 53 (3) (1) of the German Copyright Act.

<sup>65</sup> See BGH [1997] GRUR 459, 462 – CB-Infobank.

As noted, not all Member States extend the scope of Article 5 (3) (a) EUCD to acts of communication to the public. In Belgium, a specific provision was introduced to cover the communication to the public for purposes of illustration for teaching or research by officially recognised establishments, whilst less restrictive requirements apply with regard to reproductions made for such purpose. In both cases, a levy is payable. Czech law permits the use of works in lectures for a variety of purposes. Provisions permitting both the reproduction and the communication to the public (i.e. provision referring to the general use of works) are in place in Cyprus, Estonia, Germany, Luxembourg, Malta, the Netherlands and Portugal<sup>67</sup>.

In France, the communication to the public for educational and research purposes will be permitted as from 2009. Such use is subject to fair compensation.

In Germany, a new provision permitting the making available of works to the public for certain educational and scientific purposes (Article 52a of the German Copyright Act). It was introduced under the first basket, and its validity was limited until 31.12.2006. The provision will, however, be re-entered into force. The controversial provision allows the making available of works in educational institutions. The requirements differ according to the type of establishment. The clause is limited to non-commercial purposes and only permitted with the consent of the right holder in certain cases, such as in the case of film works and works specifically created for the use in school teaching. Schools and non-commercial educational institutions (such as vocational training institutions) may make works available for the purpose of illustration in the course of school teaching and for a dedicated circle of participants. Making available for the purpose of research is permitted more generously in universities for any research purpose to the extent that the making available concerns scientific research and a clearly distinguishable group of recipients. It must not be extended to anyone outside that circle and the institution must, according to the preparatory materials, take eligible technological precautions<sup>68</sup>. The provision, as far as research purposes are concerned, goes beyond Article 5(3)(a) since the illustration requirement is absent. It reflects aspects of the Directive by combining elements of Article 5(3)(a) with aspects of Article 5(3)(n) (making available of works in certain institutions such as libraries for purposes of research).

In Spain, both the reproduction and communication to the public are permitted but restricted to school teaching. However, the quotation exception may likewise apply for educational and research purposes.

In Ireland and the UK, a general limitation for research or private study partially applies. These provisions permit any fair dealing for the purpose of research and private study and are not restricted to any specific act.

In Denmark, Finland, Norway and Sweden the use of works for educational purposes and scientific research is subject to extended collective licensing schemes; a provision on

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<sup>67</sup> In Portugal, the source requirement is absent.

<sup>68</sup> See the official explanation, BT-Drucks. 15/38, p. 47.

communication to the public is absent and the subject matter is restricted. Specific provisions in these jurisdictions apply with regard to educational uses made in relation to works of fine art. Greece only permits reproductions for purposes of teaching. In Ireland and the UK, specific and detailed provisions governing reproductions in educational establishments apply, which are governed by specific licensing agreements. In Italy, Article 5 (3) (a) is marginally reflected in provisions dealing with quotations and reprographic copying. Poland only allows a fragmental use against payment of remuneration, restricted to textbooks and similar educational works.

### ***Limitations for People with Disabilities***

The provision of Article 5 (3) (b) is now part of the copyright law of all Member States, with minor deviations. In Greece, the provision is restricted to blind, deaf and mute people. Lithuania has additionally restricted the limitations to research purposes. In Ireland, rather more restrictive provisions permitting the supply of additional copies for the benefit of people with disabilities is in place. In the UK, the exception only applies to the visually impaired.

	<b>Provision</b>	<b>Scope and applicability</b>
AUSTRIA	Art. 42d	Limited to works not already commercially supplied in a usable format - author receives a fair remuneration.
BELGIUM	Art. 22 (1) (11)	Use may not conflict with the normal exploitation of the work and may not unreasonably prejudice the legitimate interests of the rightholders.
CYPRUS	Art. 7 (2) (19) (s)	Same scope as article 5 (3) (b) EUCD.
CZECHIA	Art. 37 (2) (c)	Same scope as article 5 (3) (b) EUCD.
DENMARK	Art. 17	Same scope as article 5 (3) (b) EUCD.
ESTONIA	Art. 19(9)	Use of works made in Braille or another technical manner for the blind only – not applicable to works created especially for the blind to be reproduced in such manner - source has to be indicated – use is not limited to the extent required by the disability.
FINLAND	Art. 17	Subject to extended collective licensing, therefore not considered a copyright limitation – includes communication of the work other than by broadcasting.
FRANCE	Art. L-122-5-	Disability must be motorial, mental, sensorial, psychological,

	<b>Provision</b>	<b>Scope and applicability</b>
	7 <sup>oo</sup>	cognitive or physical, should amount to a rate to be determined by the Conseil d'Etat, and should be recognised by a specialised commission or a medical certificate - reproduction and representation by a legal entity or publicly open establishments - list of eligible institutions to be determined by the authorities - for the purpose of a strictly private consultation of the work by disabled people.
GERMANY	Art. 45a	Copyright owners are entitled to fair compensation, unless only a few copies are made.
GREECE	Art. 28A	Blinds and deaf-mutes - by resolution of the Minister of Culture the conditions of application of this provision may be determined as well as the application of this provision for other categories of people with a disability - only reproduction, no public communication allowed.
HUNGARY	Art. 41 (1)	Same scope as article 5 (3) (b) EUCD.
IRELAND	Art. 104	Reproduction by a body designated by the Minister – with the purpose of modifying it to meet the specific needs of a disabled person – supply of the modified copy to the disabled person – if the modified copy is subsequently made available to the public it is treated as an infringing copy.
ITALY	Art. 71bis	Categories of disabilities and criteria to identify individual beneficiaries stated in a decree - if necessary, conditions for exception will be stated in a decree.
LATVIA	Art. 19 (1)(3), 22	Visually and hearing-impaired only.
LITHUANIA	Art. 22 (1) (2)	For educational and scientific research purposes only - visually and hearing-impaired only - exception of works specially created for this purpose.
LUXEM-BOURG	Art. 10 (11)	Same scope as article 5 (3) (b) EUCD.
MALTA	Art. 9 (1) (i)	Additional: translations and distributions.
NETHER- LANDS	Art. 15i	Fair compensation.
NORWAY	Art. 17	Literary or scientific works or musical works - copies in other form than sound recordings – blind, visually impaired or otherwise unable to enjoy the work in the usual way due to a disability - reproduction on film with or without sound for those with impaired hearing or ability to speak - reproduction of copies produced by others for the these purposes are excluded - statutory license: government may license organisations or libraries to reproduce a published literary or scientific work by making a



	Provision	Scope and applicability
		fixation on a device that can reproduce them for the purpose of free use by disabled people - published works of art or photographic works may be included in connection with the text – right holder receives remuneration.
POLAND	Art. 33	Same scope as article 5 (3) (b) EUCD.
PORTUGAL	Art. 75 (2) (i)	Same scope as article 5 (3) (b) EUCD.
SLOVAKIA	Art. 29	Same scope as article 5 (3) (b) EUCD.
SLOVENIA	Art. 47a	Provided that the work used is not available in the desired form - equitable remuneration - “no economic advantage” in stead of “non-commercial nature”.
SPAIN	Art. 31bis (3)	Same scope as article 5 (3) (b) EUCD.
SWEDEN	Art. 17	Remuneration – source must be mentioned – allowed to make digital copies for use in synthetic speech or Braille displays - sound recordings and talking books excluded - only libraries or organizations with special permission from the Government are allowed to produce talking books freely, to communicate copies through a network directly to disabled people, and to make copies of radio or TV broadcasts and films for people who are deaf or hearing-impaired.
UNITED KINGDOM	Art. 31A – 31F	Only visually impaired and people who are unable, through physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would normally be acceptable for reading – recordings of performances are excluded - provided that the work used is not available in the desired form.

### *Use for Reporting Current Events*

Article 5(3)(c) permits member states to introduce limitations for the benefit of press and other media uses. In its first alternative, the provision allows the reproduction and communication to the public of certain published or broadcast articles dealing with current topics of an economic, political or religious nature. Reproductions of such articles may only be carried out by the press. In its second alternative, Article 5(3)(c) permits member states to exempt certain acts concerning the reporting of current events. This relates to any reproduction, communication to the public and making available of such works or other subject matter.

	Provision	Scope and applicability
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AUSTRIA	Art. 42c, 44, 79	Own use: no requirement of source acknowledgment, combination of article 5 (2) (b) and 5 (3) (c) EUCD - specific clause for the press: same scope as Art. 5 (3) (C) EUCD - simple news not copyright protected, but a grace period of 12 hours is prescribed.
BELGIUM	Art. 22 (1) (1)	Irrelevant if the use is reserved - also applies to related rights and databases by analogy.
CYPRUS	Art. 7 (2) (10) (j)	Same scope as Art. 5 (3) (c) EUCD.
CZECHIA	Art. 34 (1)(b)&(c)	Only applies to periodical press or other mass communication medium articles, which have already been published.
DENMARK	Art. 23(3), 23(4)	Works produced with a view to use in newspapers or periodicals excluded.
ESTONIA	Art. 19 (1), (3)	Extensive limitations related to the press and reporting currents - no restriction to specific purposes of information, criticism or review - extension to “summaries” – irrelevant if the use is reserved - limitation does not apply to acts of making available.
FINLAND	Art. 13, 13a, 23, 25b	Provision does not apply to digitally published content.
FRANCE	Art. L-122-5-3 (b), 122-5-9°	Does not apply to works that consist by themselves in reporting news - irrelevant if the use is reserved -
GERMANY	Art. 49, 50	Applies to broadcasted commentaries and newspaper articles - if the reproduction exceeds an overview of short parts of several articles, the author is entitled to a fair compensation .
GREECE	Art. 25	Reproduction and communication to the public by mass media of works seen or heard in the course of a current event - does not require the indication of the source, including the author’s name - does not cover publications of articles or communication of broadcast works – only implements the second limitation contained in Article 5(3) (c) EUCD.
HUNGARY	Art. 37 (1), 36 (2)	Same scope as Art. 5 (3) (c) EUCD.
IRELAND	[-]criticism and review defence, sec. 51	Not implemented but the limitations broadly falls within the scope of fair dealing for the purpose of criticism or review - restriction that the use of the work must not unreasonably prejudice the copyright owner’s economic interests – irrelevant if the use is reserved.
ITALY	Art. 65(1)	Only applies with respect to use in other magazines or newspapers, or broadcast in news programs – in addition to the name and source, the date must also be indicated - no restriction as to the informatory purpose applies, though such restriction will be implicit.
LATVIA	[-]	Not implemented (general private copying limitation, Article 19 (1))

LITHUANIA	Art. 24 (1)	Same scope as Art. 5 (3) (c) EUCD - works are specified.
LUXEMBOURG	Art. 10 (3)	Strictly limited to informatory purposes.
MALTA	Art. 9 (1) (j)	Additional: translations and distributions - current events restriction.
NETHERLANDS	Art. 15, 16a	Moral rights have to be respected – additional: translations – also applicable to neighbouring rights.
NORWAY	Art. 23a, 25	Images of published works of fine art and photographs - works which have been created for inclusion in news media are excluded – right to receive remuneration except when the news item concerns the work itself.
POLAND	Art. 25 (1)	Additional: translations – right to receive remuneration except for citing and the use of reports on current events
PORTUGAL	Art. 75 (2) (m)	No requirement that the source, including the author's name, be indicated.
SLOVAKIA	Art. 33 (2)(a),(b) Art. 69 (2a)	Same scope as Art. 5 (3) (c) EUCD – the use of a short part of a work perceivable in the course of current events being the subject of news reporting is not limited to informatory purposes – regarding use by broadcasters: no explicit requirement that the event is a current event, but implicitly news is a current event, not limited to informatory purposes, indication of source not required.
SLOVENIA	Art. 48	Irrelevant if the use is reserved.
SPAIN	Art. 13, 33	No copyright protection for factual news - dissemination may only take place in any other medium of the same type (i.e. mass communication).
SWEDEN	Art. 23	Works which have been created for inclusion in news media are excluded – right to receive remuneration.
UNITED KINGDOM	Art. 30	Not required to indicate the source in news reports by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise – photographs excluded.

## **General Observations**

The way in which member states regulate the use of press items and limitations from the benefit of the media varies significantly, both as regards the more specific details and the overall coverage.

One initial observation is the treatment of factual news. The limitation, under national law, only applies once the subject matter is protected by copyright law. Therefore, news articles of a non-original character, such as factual information on current events ('simple news') would rarely attract copyright protection in those member states where a certain level of originality must be achieved. In this regard, Austria maintains a specific provision dealing with simple news that do not exhibit an original character. Here, a specific twelve hour grace period is in place in order to ensure that time sensitive news are protected, though in this case any mode of use is exempt. Factual information or news are, under express provisions, not protected by copyright in Hungary and Spain.

### **Implementation of Article 5(3)(c)**

The following paragraph will first portray the solutions of member states where the provision was not or only marginally transposed. The following paragraph will detail member states where either the provision was transposed in a manner more similar to the Directive or where similar provisions already pre-existed. In general, the use of works for reporting current events is permitted, to varying degrees, in all Member States, but the precise coverage significantly varies. Provisions identical to Article 5(3)(c), as regards both alternatives, only exist in Malta, Lithuania, Luxembourg and Portugal. In all other member states, limitations for the press are regulated in a rather dissimilar manner. The differences concern, predominantly, only certain aspects of Article 5(3)(c), such as the types of uses that may be made and, more importantly, the addressees of the limitations.

In Denmark, Finland, Norway and Sweden the provision was not implemented. In Norway, a distinction is made between the general use of copies or images of artistic works for the purpose of news reporting and, additionally, for cases where works are included in the course of reporting. Similar restrictions to artistic works apply in Denmark and Sweden where a general permission benefiting the media is absent. These countries also exclude the use of any such work specifically created for media uses. In Finland, the law was amended to cover certain internal uses with respect to news articles and accompanying images or photographs. Similarly, the first alternative was not implemented in Greece and no comparable limitation exists.

In France, only a comparatively narrow provision mirroring some aspects of Article 5(3)(a) was introduced to allow the whole or fractional reproduction, for information purposes, of a work of graphical, plastic or architectural art, by means of written, audiovisual or on-line press. The clause is restricted to informatory purposes and the author's name must be indicated.

The UK and Ireland provide for a defence for purposes of news reporting, which is systematically attached to the fair dealing provisions safeguarding uses for the purpose of criticism and review. There is no restriction as to the topical scope and any such use is subject to 'fair dealing'<sup>70</sup>. 'Fair dealing' for purposes of reporting current events is

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<sup>70</sup> Fair dealing is generally perceived not as a limitation in the sense of continental authors' right jurisdictions but, more narrowly, as a defence to certain acts otherwise infringing copyright.

subject to a case a by case analysis that takes into account various factors, such as the purpose for which the work is used and the amount of a work used, and the effects of such use on the commercial exploitability of the work. It is noteworthy that UK jurisprudence has expressly rejected to interpret fair dealing for news reporting in the light of freedom of expression guarantees<sup>71</sup> Slovakia permits the reproduction, communication to the public and distribution of any work of a current interest character. This is not restricted to the press uses but granted as general privilege with respect to any subject matter dealing with current interest issues. In Slovenia, any work may, generally, be used without restriction, provided that it formed part of a current event reported on; the use of factual news of the day is also permitted without further conditions. A general clause also operates in Spain. The law permits, for purposes of the press, the further use of works and articles on “current topics” (*temas de actualidad*) disseminated by mass communication media. The use covers the reproduction, distribution and communication to the public of such works and articles by other mass media. A similar general provision is also present in the Czech Republic, which exempts uses within the course of reporting on a current event during which a work is being performed, exhibited or otherwise used, and certain uses of works for the benefit of periodical publications and mass communication media.

### **Reproduction and Communication to the Public of Articles on Current Events**

As regards member states recognising the first alternative of Article 5(3)(c) more closely, all comply with the Directive as regards the core regulatory area, in that limitations are in existence which allow the press or media to make copies for purposes of reporting current events. Of these member states, the statutory texts deviate with regard to the beneficiaries. No specific restriction to the press or media is in place in Austria, where the respective provisions is a reflection constitutes a limitation for own private use.

In relation to the first alternative of Article 5(3)(c), most member states indicate a restriction that is in line with Article 5(3)(c) as regards the confinement to published articles and broadcasts.

### **Published articles on current topics**

Significant deviations in the respective description of the character of news articles that may be reproduced or communicated can be observed. The Directive confines this to economic, political or religious topics that address current events, but a specific reference to such purposes is only present in Cyprus, Estonia, Lithuania, Luxembourg, Malta and Portugal.

The type of subject matter is also restricted in Belgium, where only short fragments may be used, and Latvia, which refers to both quotations and short fragments; Germany refers to broadcast news and published articles.

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<sup>71</sup> *Ashdown v Telegraph Group* [2001] 2 All E.R. 370 (C.A.). The fair dealing defence was understood as much narrower than in most jurisdictions and is interpreted more restrictive than under previous case law.

## **Reproductions by the Press**

The Directive, as far as reproductions of protected articles on current topics is concerned, only privileges the ‘press’, a term not defined under the Directive. Some statutory texts refer to the media at large or include the use by broadcasters or in films.

In addition to those member states where the provision was transposed literally, restrictions to uses by the press and other media (as far as the limitation on the reproduction right is concerned) exist in Germany (‘newspapers’), Spain (‘mass communication media’), Poland (‘press, radio and television’), Italy (‘magazines or newspapers’ and news broadcasts) and the Netherlands (all press publications and ‘any other medium’).

In Austria, Slovakia and Slovenia, no express restriction on the addressee is in place. Thereby, the situation as regards the use of news items in online news services seems only covered in Austria, the Netherlands, Slovakia Slovenia and potentially Spain.

In Austria reproductions of such articles may be carried out by anyone. The background here is that the respective limitation is subject to the provision on individual uses and thus broadly falls in the concept of copies made for own purposes other than domestic uses.

Finland permits the reproduction of news articles for certain internal purposes in public authorities or commercial entities, but this is subject to an extended collective license (see the discussion in the next paragraph).

## **Communication to the public**

Article 5(3)(c), as noted, permits anyone to communicate to the public press articles and broadcasts. Such communication to the public may take the form of making the work available interactively, though not all member states follow this expressly. Hence, the permission to communicate works to the public is present in nearly all member states. In Estonia, the press privilege remains confined to physical uses (copying and distribution of copies).

In all member states, this necessarily covers uses by the media. However, some member states provide for an extension to certain uses within public or private establishments and entities, and also to private persons. In general, the communication to the public of certain news articles is permitted, in full compliance with Article 5(3)(c), in a number of member states but the coverage varies. Communication to the public of press articles is permitted in Austria, Belgium, Cyprus, Germany, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Poland, Slovakia, Slovenia and Spain but limited to fixations of photographs in Latvia, to short fragments of works in Belgium, and to certain artistic works in the Nordic countries. Similarly, certain types of broadcast news are included in the respective provisions in Austria (‘news reports’), Germany (‘broadcast commentaries’), Italy (‘articles broadcast or made available to the public’), the

Netherlands (any news item), Portugal (broadcast works) and Slovakia (work disclosed in any medium).

There are also deviations as regards the uses which may lawfully be made. In Estonia, communication to the public only refers to certain traditional forms of broadcasting and similar simultaneous transmissions. In Italy, communication to the public is referred to as a 'broadcast in news programs' only. Conversely, an express reference to acts of making available was included only in Belgium, Cyprus, Poland, Lithuania and Portugal. In other member states the mode in which the news items may be communicated is not specified, i.e. the general expression 'communication to the public' had been employed.

Whether the communication to the public of current articles and news may be carried out by anyone is likewise an issue that receives different treatment. In most member states the limitations, as far as communication to the public is concerned, privileges any third party, in line with Article 5(2)(c), to publicly communicate news items. Hence, as far as acts of communication to the public are concerned, the privilege extends to anyone in Austria, Belgium, Cyprus, Germany, Lithuania, Luxembourg and Malta, whereas in Hungary the communication to the public is permitted only to news media. In Spain, the respective press privilege only extends to a communication to the public by mass communication media. Importantly, the Spanish Act also provides that any use by way of communication to the public must be made in the same medium as the one from which the originated.

A certain extension of the limitation applies as regards internal uses. In Finland, the use of analogue copies in certain establishments is permitted but subject to a collective licensing scheme. A few copies of a work that forms part of 'a news program or similar' may be made available through radio or television broadcasts without a restriction that this is done few copies of a work which makes part of a news program or similar made available through radio or television broadcasts.

In Italy, conversely, the privilege only extends to the communication to the public of news made during current events; here, the limitation only applies to uses by the media rather than any other person or entity. In the Netherlands, a similar restriction to media uses is in place.

### **Reporting Current Events**

Specific provisions dealing with reproductions of articles concerning the reporting of current events are in place in most member states and no significant deviations can be observed. The statutory text in Estonia, for instance, refers only to the use of works 'seen or heard' during an event. Italy and Greece likewise refer to current events without mentioning the particular requirement that the use must be limited to an extent justified by the purpose of news reporting, though such requirement appears implicit.

Again, the situation in the Nordic countries is different. In Denmark, Finland, Norway and Sweden no general limitation benefiting current news reporting is in place.

### ***Quotations***

Specific limitations for the purpose of quotations exist in all Member States. There are no significant deviations with regard to the Directive though some minor peculiarities should be mentioned.

In the Czech Republic, the limitation for the purpose of quotations is covered partially by further limitations for purposes of criticism and private copying. Slovenia does not include a specific limitation on quotation, though here the particular limitations for purposes of news reporting may apply. In Spain, quotations are permitted but additionally restricted to certain purposes.

As regards Ireland and the UK, the fair dealing defence relating to criticism, review or news reporting as well as the defence for purposes of research and private study may encompass quotations.

### ***Public Security***

Provisions for the benefit of public security exist in all Member States, with minor deviations in scope, with the exception of Belgium, Norway, Slovakia and Slovenia.

### ***Use of Political Speeches***

Limitations of the type prescribed under Article 5 (3) (f) EUCD on the use of political speeches are in place in all Member States with the exception of Austria and Belgium. Political speeches are excluded from copyright in Norway. In the UK, the use of speeches is not governed by a specific defence but will normally constitute fair dealing for the purpose of criticism and review.

### ***Religious Celebrations***

Article 5 (3) (g) EUCD, to varying degrees, is reflected in all Member States but Austria, Cyprus, Estonia, France, Italy, Luxembourg, Portugal and Slovenia.

### ***Use of Works of Architecture***

This limitation applies in all Member States except for Estonia, Italy and Slovenia. There are no noteworthy deviations.

### ***Incidental Inclusion***

The incidental inclusion of works is permitted in all Member States except in Austria, Belgium, the Czech Republic, Estonia, France, Greece, Italy, Latvia, Luxembourg, Poland and Slovenia.

### ***Advertising Public Exhibitions***

A limitation for purposes of copying artistic works for inclusion in catalogues for advertising and auction does not exist in Cyprus, Estonia, Italy, Latvia, Lithuania, Luxembourg and Slovenia.



### ***Caricature, Parody and Pastiche***

Caricatures and other forms of derivative uses under Article 5 (3) (k) EUCD are expressly permitted under statutory law in Belgium, France, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Spain.

Other member states take different approaches. The Nordic countries consider transformative uses, in general, as a creation of a new work for which consent by the right holder is not required. The Copyright Acts in Austria, Germany and Portugal contain a general 'free use' clause that is not restricted to the uses mentioned in Article 5(3)(k). In Germany, for instance, the 'free use' clause does not exempt certain uses but reflects a general principle in that certain derivative or transformative works will not infringe. In this respect, the free use clause represents not a limitation but reiterates a general principle. The general requirement is that a certain distance to the original must be kept, in the sense that the protected expression in the original work used in a derivative work has been used as inspiration only.

In Italy, the scope of the limitation seems to be less permissive in that caricatures etc. must comply with the requirements of the quotation exception.

Certainly the least permissive jurisdictions as regards the use of works for caricature purposes are the common law copyright systems. In both Ireland and the UK, caricature and parody is not as such recognised as a free or derivative use. In some cases, the fair dealing defence for purposes of criticism or review and/or reporting current events may apply, though this is subject to the general restrictions under these defences..

### ***Demonstration and Repair***

Such limitations exist only in relatively few Member States, including Austria, the Czech Republic, Finland, Germany, Ireland, Lithuania, Malta, Poland and Portugal.

### ***Reconstruction of Buildings***

This is recognised in the copyright laws of Lithuania, Malta, Norway, Poland, Portugal, Slovenia and Spain. Some aspects of Article 5 (3) (m) EUCD are covered by provisions in Denmark, Finland, Norway and the UK.

### ***Making available for Research or Private Study***

Article 5 (3) (n) EUCD was newly introduced into the laws of some Member States. Most Member States have implemented Article 5 (3) (n) literally, including Belgium, Cyprus, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal and Slovakia.

	Provision	Scope and application
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	<b>Provision</b>	<b>Scope and application</b>
AUSTRIA	--	Not implemented.
BELGIUM	Art. 22-9	Same scope as Art. 5 (3) (n) EUCD.
CYPRUS	--	Not implemented.
CZECHIA	--	Not implemented.
DENMARK	Art. 21 (3)	Works which have been made public may be made available in public libraries to individuals for personal viewing or study on the spot by means of technical equipment.
ESTONIA	Art. 20 (3)	Same scope as Art. 5 (3) (n) EUCD, but only on orders from natural persons.
FINLAND	Art. 16b	Libraries - further copying or communication must be made impossible.
FRANCE	Public law	Not implemented in copyright law – public law provision on obligation to deposit copies of works with National Library – consultation of works on the premises, only by authorised researchers and organisations in charge of the legal deposit of works, on individual terminals, usage reserved to those researchers - reproduction of a work to make such consultation possible.
GERMANY	(draft)	Not implemented yet, draft to introduce the exception limited to dedicated terminals - public display of works in libraries, archives and museums at electronic terminals - contractual agreements detailing such use will supervene in all cases - establishments must make other use of such terminals impossible – remuneration.
GREECE	--	Not implemented.
HUNGARY	Art. 38 (5)	Same scope as Art. 5 (3) (n) EUCD, but the use is free in the absence of contractual provisions to the contrary - in addition, the text refers to audio and audiovisual archives - alteration, retransmission and copying must be made impossible – provision will potentially be broadened to interlink institutions - separate legislation to detail specific conditions of such use in general under an accompanying decree.
IRELAND	--	Not implemented as such - research and private study exceptions only apply with respect to copying.
ITALY	Art. 71ter	Same scope as Art. 5 (3) (n) EUCD.
LATVIA	--	Not implemented.
LITHUANIA	Art. 22 (1)(3)	Same scope as Art. 5 (3) (n) EUCD, except it is not required that the works are only made accessible to “individual members of the public”.
LUXEM- BURG	Art. 10	Same scope as Art. 5 (3) (n) EUCD.

	Provision	Scope and application
BOURG	(14)	
MALTA	Art.9(1)(v)	Same scope as Art. 5 (3) (n) EUCD.
NETHERLANDS	Art. 15h	Same scope as Art. 5 (3) (n) EUCD, except for the fact that this section is subject to the parties' agreement to the contrary.
NORWAY	-- [not yet]	Possibility for King to give further regulations to implement Art. 5 (3) (n) EUCD.
POLAND	Art. 28 (1) + (3)	Not limited to individual members – works subject to purchase or licensing terms not excluded.
PORTUGAL	Art. 75 (2) (o)	Same scope as Art. 5 (3) (n) EUCD.
SLOVAKIA	Art. 37	Not implemented as such - public display of the original work allowed if author knew he sold/transferred the copy to a natural entity or legal person whose customary activities include displaying works - public display may not prejudice fair exploitation of the work and may not otherwise prejudice the rights of the author.
SLOVENIA	--	Not implemented.
SPAIN	Art. 37 (3)	Communication or making available to designated individual persons - remuneration.
SWEDEN	--	Not implemented.
UNITED KINGDOM	--	Not implemented.

Germany has not transposed the provision as such but combined the limitations on educational establishments, for teaching and scientific research purposes and for making available online into a new provision permitting the use of scientific articles for making available to a small group of researchers<sup>72</sup>. It is, as noted<sup>73</sup> currently still debated whether the second basket will change this or whether the initial solution under Article 52a of the German Copyright Act will be maintained. A new Article 52b is also likely to be introduced, which will govern the use of published works in libraries, museums and archives on dedicated terminals for purposes of research and private study.

<sup>72</sup> See Report on Germany, **XIB.XIX**, p. 230.

<sup>73</sup> See the discussion on Article 5(3)(a) above, p. 33.

In Norway, the implementation of Article 5 (3) (n) is subject to future consultations. In France, such use is permitted under general public laws governing libraries. Poland has restricted the scope of Article 5 (3) (n) to the use in schools.

Estonia has restricted Article 5 (3) (n). The limitation only applies if the work is specifically ordered on the premises of an institution for research purposes. The limitation is additionally restricted to orders by natural persons.

### ***Uses in case of Minor Importance***

There are very few provisions in the copyright laws of Member States that would expressly fall within the minor importance clause; there are no deviations ascertainable.

## ***IV. The Three-Step-Test (Article 5 (5) EUCD)***

The status of the three-step-test, as envisaged under Article 5 (5), varies considerably as between Member States. In the course of implementing the Directive, a number of Member States have expressly adopted the test as an element of national law. In the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia the test constitutes a directly applicable rule in substantive law as regards the interpretation of limitations, and is as such recognised with respect to all limitations. Likewise, the test was applied by courts in Austria, Belgium, Finland and the Netherlands as a general principle of copyright law.

The status of the three-step-test is uncertain in Germany. The test was referred to in judicature in two decisions<sup>74</sup>, but the rule is traditionally, at least in academic writing, perceived as a matter of legislative compliance with international prerequisites rather than a rule of interpretation of domestic law. However, it should also be noted that certain features of the test are recognised in the interpretation of limitations. According to the traditional view, limitations must be construed narrowly and not be applied by way of analogy. This approach covers, to a certain degree, the implicit requirement that a use must not prejudice the author's economic interests. Despite this, the press services decision<sup>75</sup> referred to the scope of the test and contended that an extension of the press limitation permitting the in-house digital archiving of press articles would require an observation of the three step test, and thus a remuneration scheme for authors. It should be noted, however, that the court did not expressly apply the three step test under existing law but arrived at that conclusion by way of a comparison between and combination of certain limitations in existence<sup>76</sup>. In a decision concerning almost an identical issue, a Dutch court held that the use of press articles was incompatible with a normal exploitation<sup>77</sup>.

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<sup>74</sup> See BGH, 11.7.2002, I ZR 255/00 – *Elektronischer Pressespiegel*; BGH 25.2.1999, I ZR 118/96 – *Kopienversanddienst*.

<sup>75</sup> Federal Court of Justice, 11 July 20002, [2002] GRUR 963.

<sup>76</sup> See § 49 UrhG and Report on Germany, **XIB.IV**, p.225.

<sup>77</sup> Rechtbank s' Gravenhage, 2 March 2005, [2005] Computerrecht 143.

In Norway, the three-step-test is not perceived as a substantive rule, and thereby considered to be binding on the legislator only. In the UK, it was also expressly asserted that the three-step-test would bind the legislator only. Courts would, however, take into account the commercial consequences when applying certain defences under the general fair dealing test, which, as noted, poses an additional requirement applicable to all limitations.

According to a French decision, the three step test may restrict the ability to make private copies if such copying is prevented by technological protection measures. The court applied both Article 9 (2) of the Berne Convention and Article 15 of the Rome Convention. It ruled that, in case where TPM's are applied to a work preventing the making of a private (analogue) copy, the application of the second step of the three-step-test may mean that enforcing the private copying limitation might violate the protection granted to the author and owner of the sound recording, in that the private copying limitation interfered with the normal exploitation of the right holder's market<sup>79</sup>. Thereby, the normal exploitation limb of the test may be dissimilar according to whether TPM's have been applied or not.

### C. Compensation Systems

A major source of deviation concerns the compensation schemes in operation. It is noteworthy that only very few Member States have updated existing law on compensation. It is likewise noteworthy that no Member State, where applicable, has fully resolved the problem of the concurrent application of technological protection measures to works and existing levy schemes. The way in which Member States compensate authors and right holders falls widely in four different categories.

For those limitations for which a fair compensation is required, such claim can be made hypothetically in Cyprus, Malta and Luxembourg though in these countries no collective administration of rights is in place.

In relation to private copying, most Member States employ a levy scheme that operates on the basis of collecting levies imposed on physical carriers and copying devices. This is the case in all Member States but for those mentioned below, and usually the levy is, as far as traditional copying devices is concerned, imposed on photocopiers and other copying devices as well as on copying equipment such as blank tapes. The applicability of such levies to digital copying devices has now been established in Spain<sup>80</sup> where the levy is extended to personal computers. Estonia, conversely, permits the making of private copies (for domestic and personal uses) without payment of remuneration

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<sup>79</sup> TGI Paris, Jugement rendu 10 janvier 2006, No. RG 03/08874 – *Christophe R; Union des Consommateurs Que Choisir v. Warner Music France; S.A. FNAC Paris*.

<sup>80</sup> See Report on Spain, **XXVIC**, pp. 425

though a claim for equitable remuneration for reprographic copying is part of the levy scheme. The same applies in Slovakia.

In addition to levies applied for reprographic uses and private copying, some member states also impose levies on a variety of other uses. Levies apply to reproductions made for textbooks for teaching purposes or making available and public communication of audio-visual works in schools and universities in Austria. In Belgium, and Estonia, certain educational uses are covered. Copying in libraries is expressly subject to the compensation scheme in Italy. Press limitations are subject to a levy system in the Netherlands. Portugal collects levies for uses in libraries, museums and archives and for broadcasts made by social institutions.

In Germany, the second basket envisages to introduce a reformed regime. Currently, all private copying limitations<sup>81</sup> are subject to levies. The new scheme will be radically modified. The setting of levy tariffs will no longer be legislatively conducted. Instead, the parties are free to negotiate terms in relation to tariffs. It is foreseen that a cap will be introduced for certain media, particularly for personal computers. Accordingly, the new law gives the owner of copyright, in the cases covered under the limitations on the reproduction right, a positive claim against manufacturers of devices and media which, by itself or in connection with other devices, permit the making of reproductions. The claim is based on reasonable compensation to be determined according to the actual amount of copies typically made, i.e. the tariffs depend upon the real scope in which such devices are used for making reproductions. A similar scheme under which the tariffs are to be set by collecting societies is envisaged in the Netherlands. In Hungary, tariffs are currently negotiated with the respective collecting society.

In the Nordic countries, different forms of licenses are in place. In most cases, extended collective licenses cover the use of works in institutions, though individual compensation schemes also exist.

In the UK and Ireland, individual licensing of certain acts is the norm. A general levy scheme is absent. The respective Copyright Acts set out, in meticulous detail, certain types of defences for a range of (predominantly) institutional uses. In the UK, for instance, the Copyright Licensing Agency enters into agreements with certain institutions covering certain instances of reproductions, in particular with regards to universities and schools.

The application of technological protection measures must be taken into account in determining claims made under existing levy systems in Germany, France, Italy, and Hungary.

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<sup>81</sup> This includes any form of private copying under Article 53(1) to 53(3) of the German Copyright Act.

## **D. Technological Protection Measures**

The most significant deviations can be observed in relation to the transposition of Article 6. These deviations fall into three groups. First, two Member States have not implemented Article 6 (1) (Czech Republic, Cyprus), but maintain a prohibition on commercial dealings in circumvention devices as a consequence of acceding to the 1996 WCT and WPPT<sup>82</sup> - in the Czech Republic as a general exclusive right, in Cyprus as a criminal offence. In all other Member States, Article 6 (1) was implemented. Here, deviations may be ascertained with regard to the scope of protection offered and the interaction with Article 6 (4). Other Member States have fully implemented Article 6 as prescribed. Some Member States have implemented Article 6 (2) but additionally continue to apply pre-existing criminal prohibitions on circumvention not adjusted to Article 6 (1). This is the case in Poland, Ireland and Spain.

As to the scope of Article 6 (1), there are initial differences as regards its legal nature. The options open under Article 6 (1) were either to grant the right to prohibit the circumvention of technological protection measures as an exclusive right annexed to the economic rights in copyright law, or alternatively as a positive right based upon civil tort law and/or criminal law. Finally, some Member States have opted to transpose Article 6 (1) entirely outside the scope of a positive right but merely grant permission to the right holder to apply technological protection measures.

The application of Article 6 varies considerably. Almost all Member States provide protection under Article 6 with regard to copyright subject matter and the database sui generis right. There are considerable differences, however, in the application of Article 6 to computer programs.

All Member States now prohibit, to varying degrees, the circumvention of technological measures. There are striking dissimilarities in the way in which Article 6 has been transposed, however, and the following is intended to provide an overview of the different solutions and major deviations that can be observed. The range of implementing opportunities is rather wide. Member States have taken very different approaches in relation to categorizing acts of circumvention. These range from giving the use of technological protection measures the status of a quasi-exclusive right emanating from authorship to merely permitting right holders to apply them.

### **I. *Effective Technological Protection Measures***

#### **Definition of TPM's**

Article 6(3) contains a definition on technological protection measures. Accordingly, TPM'S are defined as 'any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts of circumvention'.

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<sup>82</sup> See Footnote 7.

The first area in which deviations can be observed relates to the object of protection as defined. Under Article 6 (3), that object is not explicitly defined; the provision merely states that technological protection measures should protect against acts not authorised by right holders, and are designed to prevent circumvention. The terminology (“designed”) does not strictly refer to a prevention of copyright infringement, and likewise, as noted, does not clarify the exact scope of the right as regards the interface between TPM’s and copyright protection.

Therefore, certain deviations can be observed that may have an impact not only on the definition of TPM’s as such, but will also influence the judicial treatment of circumvention prohibitions.

In all Member States, technological protection measures must be applied to works and other subject matter as mentioned. Most Member States have included the definition pertaining to “works and other subject matter”, which indicates that a general prohibition against acts of circumvention is not applicable in cases where the information protected by a technological measure is not protected under copyright law.

Some Member States have not fully covered the entire range of subject matter as foreseen; Poland has restricted the definition to works and artistic performances. In Austria and Germany, certain additional neighbouring rights exist (such as non-copyrightable photographs) which now enjoy protection. In Ireland, protection of TPM’s is extended to transmissions via cable. In the UK and Ireland, the ancient concept of protecting typographical layouts is covered, which, when applied to web pages, may have an over-protective effect. The problem with such extension to certain related rights is not so much the fact that the scope of the Directive is exceeded but that it may impose difficulties in relation to additional right holders.

As far as deviating definitions are concerned, some Member States have restricted the scope of TPM’s as understood in Article 6 (3) to those devices that are designed to objectively protect works against restricted acts under copyright. The effect is that the cracking of, for instance, a regional encoding applied to a DVD does not violate the anti circumvention provisions because in this case the device does not protect against an infringing act under copyright law. This is the case in Austria, Denmark and Germany. Austria, for instance, has made it clear that TPM’s must prevent or restrict acts not permitted under copyright law, which immediately restricts the scope to infringing uses. The same is true for Germany where acts not infringing exclusive rights have been exempted from the definition of TPM’s. In most other Member States, Article 6 (3) was implemented so as to clarify a certain relationship with copyright infringement, in that authorisation is only required for acts which constitute a use of the work in a legal sense.

There are also uncertainties as regards the types of technologies covered. Article 6 (3) was largely understood so as to cover both access control systems and use (copy) control technologies. It remains to be seen whether technologies that merely encrypt certain information applied to a work qualify, since such technology, as such, is not necessarily intended to restrict or prevent access or use. This concerns, for instance, information



applied to identify right holders. Such information may fall within the ambit of Article 7 provided it constitutes information for digital right management purposes.

In Sweden, analogue locking technologies are covered by the definition of technological protection measures. As to whether analogue technologies qualify in other Member States is currently open. The position in Germany appears to be that analogue protection measures aimed at preventing the making of digital copies do not qualify, either because they are not 'effective', or because they are in general not protected under the relevant legislation<sup>83</sup>. Hence, circumvention of TPM's is not prohibited in case the result is a copy made in an analogue format, for instance by using specific analogue copying modes whereby the content of a CD is copied onto a blank CD in analogue format only, that is, the sound rather than the digitised information. In this case, the private copying in analogue format is consequentially permissible because the TPM cannot prevent this. In general, this seems to infer that only those technological measures dedicated and able to preventing analogue copying are protected in this case. Conversely, the French Supreme Court<sup>84</sup> apparently took a deviating view. Here, technological protection measures restricting the ability to make copies, including analogue copies, was held to constitute a protected device, though the difference between digital and analogue copying was not further elaborated upon<sup>85</sup>.

## Effectiveness

The definition on effectiveness has been literally copied from the Directive in almost all Member States. In Norway, Slovakia and Sweden, the requirement that technological protection measures must be effective was, however, not transposed. This extends the scope of application.

There is little guidance, however, on whether copy protection technology intended to protect against the making of digital copies is protected if a user simply makes an analogue copy and thus bypasses the copy control mechanisms. The analogue gap still seems to permit the circumvention of technological protection measures in all other Member States, which rely on the definition in Article 6 (3), since arguably technological protection measures are applied with the aim of preventing digital uses and a resulting analogue use thus would remain outside the scope of Article 6 (2). It follows that the circumvention of technological protection measures intended to prevent the making of digital copies does not constitute a violation of Article 6 (1) if the measure is circumvented to make an analogue copy.

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<sup>83</sup> LG Frankfurt, Decision of 31 May 2006, 2-06 288/06 – *NAPSTER Direct Cut*.

<sup>84</sup> Decision of the Supreme Court (Cour de Cassation), First Civil Chamber, 28 February 2006.

<sup>85</sup> The previous instance had held that the private copying exception would allow circumvention. See Cour d'Appel, 22 April 2005 - Stéphane P., UFC Que-Choisir c/ SA Universal Pictures Video France, Syndicat de l'édition Vidéo (SEV), SA Films Alain Sarde, SA Studio Canal

A restriction to ‘effective’ technological protection measures has not been transposed in Poland in relation to Article 6 (2) EUCD, where an additional criminal provision continues to apply.

## **II. *Prohibition on Acts of Circumvention***

The methodology of transposing Article 6 (1) shows discrepancies. Most Member States have implemented Article 6 (1) in the respective chapters dealing with sanctions for copyright infringement. This conceptual approach clarifies a certain nexus with infringing activities, which is, as mentioned, intricately connected with the definition of technological protection measures. It could also be ascertained that most Member States do not wish to apply Article 6 (1) to acts not resulting in a restricted act under copyright law.

Article 6 (1) has been implemented in all Member States with the exception of Cyprus, the Czech Republic and Slovakia. Slovakia does prohibit the use of circumvention equipment.

Other Member States have implemented Article 6 (1) as an annex to the list of exclusive rights. In some instances, the relevant provisions mention that right holders have an exclusive right to use technological protection measures. In contrast, some Member States have opted for an apparently weaker definition by merely permitting right holders to use technological protection measures.

The spectrum of definitions and categorisations in national laws conveys a varied image of what Member States appear to see as the object of protection.

Denmark opted for a rather broad definition according to which the intentional or negligent circumvention of effective technological protection measures attracts sanctions under general tort principles.

In Hungary, protection is granted for the measure as such, i.e. circumvention need not result in copyright infringement<sup>86</sup>.

In Italy, Article 6 (1) was transposed as a non-commercial unlawful use of a copyrighted work; the Italian text also prohibits the purchase and rental of circumvention devices, though not the possession. Here, a specific problem is created by prohibiting the purchase of circumvention devices and the categorisation of acts of circumvention. The Italian implementation may thereby indirectly prohibit the use of such equipment but not the act of circumventing technological protection measures as such, unless the act of circumvention is prohibited without any link to at least an act facilitating copyright infringement<sup>87</sup>.

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<sup>86</sup> See Report on Hungary, **XIIID.I**, p.264.

<sup>87</sup> Article 102<sup>quater</sup> and 174<sup>ter</sup> Copyright Act address violations of the TPM provisions; see Report on Italy, **XVD.I**, p. 292.

Similarly, circumvention as such is described as an ‘unlawful use’ of the work in Estonia, where the situation is complicated by the fact that no restriction to *effective* technological protection measures is in place. In this instance, the national implementation appears to equate the circumvention prohibition with a use restricted under copyright law. It follows that the act of circumvention infringes copyright even if no further restricted use (such as a reproduction) ensues<sup>88</sup>. In Belgium, the act must, as a minimum requirement, facilitate copyright infringement, though the burden of proof that copyright was not infringed rests with the person circumventing<sup>89</sup>.

In France, Germany and the UK, it remains uncertain whether Article 6 (1), as implemented, requires a subsequent infringement of copyright or whether the committal of an act of circumvention is sufficient. In all three countries, an explicit assertion as to the exact scope is absent.

In France, particularly, the definition differs from Article 6 (1). The French law does not prohibit acts of circumvention if this is carried out by using circumvention technology; only acts committed without the use of technological devices (i.e. instances of individual hacking) are, therefore, covered. To a considerable extent, this necessarily permits the use of devices that are commercially available. The French law also, thereby, prohibits only certain acts such as decoding or decrypting and other forms of direct manipulation of data, under a rule relating to criminal liability<sup>90</sup>. In addition, acts done for research purposes (such as encryption research or decompilation) do not qualify as a violation of the circumvention rule. It should be noted that the French text is a criminal provision and an additional civil law prohibition is not in place<sup>91</sup>.

In Germany, the question of whether a certain nexus with copyright infringement needs to be established is debated in academic literature. It appears certain that non-infringing acts, such as uses not related to protected subject matter, are not covered. In the UK, the situation is slightly different<sup>92</sup>. Here, acts of circumvention are classified as secondary copyright infringements, and the act of circumvention must arguably result in an infringing copy. Such infringing copy may, arguably, be made by running a device even if the copy is only temporary. A recent German decision also confirmed that acts of circumvention do not require a commercial intention and that the use of any device (in

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<sup>88</sup> Article 80 (3) Copyright Act Estonia., see Report on Estonia, **IXD.II**, p. 200.

<sup>89</sup> See Article 79 <sup>bis</sup> Copyright Act Belgium and Report on Belgium, **IVD.II**, p. 132

<sup>90</sup> Article L. 335-3-1 CPI carries a fixed fine of € 3750 per offence.

<sup>91</sup> Art. L. 335-3-1 CPI states that ‘I. - Est puni de 3 750 euros d'amende, le fait de porter atteinte sciemment, à des fins autres que la recherche, à une mesure technique efficace telle que définie à l'article L. 331-5, afin d'altérer la protection d'une œuvre par un décodage, un décryptage ou toute autre intervention personnelle destinée à contourner, neutraliser ou supprimer un mécanisme de protection ou de contrôle, lorsque cette atteinte est réalisée par d'autres moyens que l'utilisation d'une application technologique, d'un dispositif ou d'un composant existant mentionné au II.

<sup>92</sup> For an overview, see the discussion in Loewenheim, § 95a UrhG, in: Wandtke/Bullinger, Kommentar zum Urheberrecht (2<sup>nd</sup> ed., Munich 2006).

this case, a CD burner) was sufficient. Therefore, only the possession of circumvention devices for private purposes is excluded<sup>93</sup>.

Slovakia has not transposed Article 6 (1) EUCD as such, but prohibits the use of equipment which facilitates circumvention, a solution that suggests the direct opposite of the French definition<sup>94</sup>. Here, the prohibition on circumvention by using such equipment is equated with an exclusive right.

In Ireland, Article 6 (1) has not been implemented but a pre-existing provision on contributory copyright infringement has been marginally updated, which leaves ample scope for debate<sup>95</sup>. The Irish Act introduced legislation on technological protection measures in 2000, which by that time mirrored the requirements under the WIPO Treaties and the Draft EUCD. Sec. 370 Copyright Act 2000 refers to copies of copyright works to which rights protection measures have been applied or recordings of performances to which rights protection measures have been applied, but it does not prohibit the circumvention. Liability is only incurred by the subsequent acts of making those works available to the public or by re-utilisation. Possessing circumvention technologies, even for private purposes, was already a criminal offence under the 2000 Act (Sec. 140 Copyright Act) and that provision, exclusively drafted as a criminal offence, continues to apply. The Act thus does not specifically implement Article 6 (1) EUCD but mirrors Article 6 (1) only to the extent that *using* a work to which technological protection measures have been applied is prohibited. The logic of the Act is difficult to reconcile with the Directive, particularly because Sec. 140 Copyright Act 2000 imposes criminal sanctions to copyright infringement where different requirements apply. The criminal prohibition, as far as private acts are concerned, extends to the possession of circumvention devices<sup>96</sup>.

In the remaining Member States, where an initial clarification of the relationship between technological protection measures and copyright protection is entirely absent, the situation remains undecided. These Member States will have to rely on the wording of Article 6 (1) EUCD. In the UK, this has instigated a debate as to whether the meaning of “pursuing that objective” relates to circumventing measures or to acts infringing copyright. The debate will thus focus upon whether the objective, as mentioned in Article 6 (1) EUCD, concerns the making of an infringing copy or whether it merely relates to circumventing. There will be consequential issues as to the (subjective) intention of the person circumventing.

As noted, the most common starting point was to characterise acts of circumvention as a general matter of copyright law, and therefore the act of circumvention will only constitute an offence once an infringing act results. This excludes, *a priori*, any circumvention carried out in order to view, read or listen to a work, which practically

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<sup>93</sup> LG Frankfurt, 23 November 2005, 28 S 6/05.

<sup>94</sup> See Report on Slovakia, **XXIV**, p. 407.

<sup>95</sup> See Report on Ireland, **XIV**, p. 279.

<sup>96</sup> Sec. 140 (4)(a)(iv) Copyright Act Ireland.

allows the circumvention in cases of regional encodings on DVD's. This might even imply (as appears to be the case in Denmark and Norway) a general self-help right permitting circumvention in order to rip tracks from a CD into mp3 format, or to remove measures in order to allow a work to be played on different mp3 players. In France, the solution taken was to oblige makers of such players to publish the source code in order to permit interoperability under a compulsory licensing scheme.

### **TPM Protection and Copyright Infringement**

The issue of the relationship between copyright infringement and circumvention slightly varies.

Austria has apparently opted for a more restrictive definition, in that acts of circumvention must result objectively in an actual infringing use.

In most other Member States, the scope of Article 6 (1) depends upon whether the circumvention at least facilitates copyright infringement. A number of Member States have made it clear that the purpose of Article 6 (1) EUCD, as implemented, is not to prevent the mere use of the work, a position expressly referred to in the *travaux préparatoires* in, for instance, Belgium, Denmark, Germany and Luxembourg. In Belgium, as noted, the act requires constructive knowledge or intention as regards the facilitation of copyright infringement. The Spanish text refers to acts of circumvention as a preparatory act.

A specific problem will, as regards the potential nexus between TPM circumvention and a requirement of a subsequent infringement of copyright, be caused by the different approaches to the meaning of what constitutes a reproduction. As noted, all member states have implemented the requirement that temporary copies must initially constitute reproductions in accordance with Article 2, and such reproductions can only be exempt at the limitation level. In relation to TPM's, even if a certain nexus between copyright infringement and TPM violation was expressly required, the status of temporary copies as reproductions will arguably be sufficient to find for an offence. A UK decision, albeit based on then existing provisions on anti circumvention rules, does likewise take a rather generous approach favouring right holders. The High Court of Justice, in 2005<sup>97</sup>, asserted that a so-called mod chip used to circumvent a regional encoding technology placed in the memory of a Playstation had to be qualified as effective circumvention control mechanism under Sec. 296 of the Copyright, Designs and Patents Act 1988. The technology in question disabled the code reader applied to the game console so that the console would play games either from different geographical zones or from other manufacturers. The code reader may also prevent the use of games copied from purchased games. The UK provisions applied govern the prohibition on circumvention protected software but the decision is likewise applicable to the new provision under Sec. 296ZA CDPA 1988. The important aspect of the two UK decisions relates to the

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<sup>97</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc. v. Gaynor David Ball and others* [2004] EWHC 1738 (Ch).

interface between Article 6 (2), Article 6 (1) and the general nexus with copyright protection. The court did, on both occasions, not clarify whether Article 6 (2) as such requires proof of copyright infringement or whether it allows right holders to generally protect works by technological protection measures. Playing a game as a result of using circumvention technology would, in most jurisdictions, not amount to an infringement of any exclusive right. However, the court did not follow that argument, on the basis that the temporary copy of the computer program made in the console memory amounted to a reproduction and, more importantly, that the temporary duplication in the memory also fulfilled the criteria of a fixation of the original work under Sec. 16 CDPA 1988<sup>98</sup>. A further case, decided in 2002, also afforded protection against mod chips on the basis of computer program copyright<sup>99</sup> but here no indication as to a requirement of copyright infringement was provided.

Very similar issues have arisen in an Italian decision, where it was, conversely, held that the playing of a computer or video game does not violate copyright<sup>101</sup>. The court did not address the temporary copying issue. A similar decision was rendered by a Spanish court under the respective criminal law provisions.<sup>102</sup>

There are, in conclusion, multiple possible variations on the scope of Article 6 (1) as implemented. The most striking disparities exist between Member States where protection is granted for technological protection measures as such and Member States where protection is (indirectly) linked to copyright infringement, though that issue is still open and debated. Considerable deviations can also be observed in Member States where acts of circumvention are treated as equivalent to copyright infringement – and where, therefore, right holders arguably enjoy a positive right to apply technological protection measures – and Member States where such act is merely annexed to the list of sanctions.

### ***Knowledge Requirements***

Article 6 (1) requires that the person circumventing must know or have reason to believe that ‘he or she is pursuing that objective’. Most Member States have implemented the knowledge requirement, but an indication as to the intention to circumvent is absent in

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<sup>98</sup> The meaning of ‘fixation, under UK law, is not necessarily restricted to permanent fixations. It is debated, for instance, whether the display of a work on a computer screen constitutes a fixation.

<sup>99</sup> *Sony Computer Entertainment Inc. v Owens* [2002] EWHC 45

<sup>101</sup> See Bolzano Regional Court, 31 December 2003, [2006] ECDR 18; available at <http://www.ipjustice.org/123103playstationdecision.html>, and Report on Italy, **XVD.IV**, pp. 296.

<sup>102</sup> See Article 270 (3) of the Spanish Criminal Code and Provincial Court of Barcelona, 22 October 2003.

<sup>106</sup> *Autorité de Régulation des Mesures Techniques* (ARMT).

Slovenia, Slovakia (which prohibits the use of circumvention equipment) and naturally those Member States that have not implemented Article 6 (1).

Intention is thereby defined in accordance with the Directive, though there remain specific ambiguities. The intention necessary must relate to “that objective”, which may describe an act of circumvention or, as mentioned, may be restricted to uses infringing copyright. It follows that the intention required must relate to the objective elements under Article 6 (1) as implemented.

Of the Member States that have transposed the intention element, France has reduced the scope to wilful acts, i.e. only acts done knowingly qualify as a violation. Belgium has implemented Article 6 (1) with respect to the knowledge required, but the Act adds a further requirement in that the person circumventing must have knowledge of both the act of circumvention and knowledge of the ensuing facilitation of copyright infringement.

There are remaining difficulties as regards the definition of the second alternative, i.e. the requisite “reason to have known”. This pertains to the objective of circumvention, which in turn denotes that such objective may either be to infringe copyright or to circumvent – again, this depends on the respective national notion as to what Article 6 (1) objectively protects. The level of intention may either translate as a negligent lack of knowledge or as recklessness.

### **Access to and Use of Works**

All Member States initially provide for protection against both the circumvention of access controls and copy control mechanisms. The French law slightly deviates from the definition as it defines the measures protected as all “mechanisms of protection or of control”.

### **III. *Sector-Specific Exemptions***

Some Member States have excluded certain acts initially from the application of Article 6 (1) EUCD, particularly concerning computer programs and research purposes. In France, the introduction of express exemptions for purposes of interoperability and encryption research was deliberated, though the final text now opts for administrative proceedings to resolve disputes.

#### **‘Free’ Use of Works**

There are no Member States in which a positive and express right to circumvent for non-infringing purposes has been explicitly introduced. The permissibility of such acts can, therefore, follow from the description of the respective act. For instance, Finland implemented Article 6 (1) EUCD by expressly referring to restricted acts in respect of works protected under copyright, which implicitly excludes acts not resulting in copyright infringement. In other Member States, as noted, the position is less clear.

## **Encryption Research**

Research into encryption has been a topic widely debated in a number of Member States. In Finland and Norway, circumvention for research purposes (including cryptography research) has been expressly excluded from the prohibition on circumvention. In Sweden, a specific clause allows encryption research but does not permit research activities beyond that.

In the UK, encryption research is permitted, but this is subject to the further restriction that the person carrying out the research does not, 'in so doing, or in issuing information derived from that research' prejudicially affect the rights of the copyright owner.

Despite the absence of an explicit clause permitting cryptography research in other Member States, the issue whether Article 6 (1) indeed prohibits such activity remains open. The central issue then is whether cryptography is to be deemed as an access or use control mechanism. In those Member States that require a violation of copyright as a consequence of circumventing technological protection measures, the status of cryptography depends upon its classification as access or use control.

## **Interoperability**

France has introduced specific provisions on interoperability, according to which technological protection measures must not restrict uses intended for achieving interoperability. The law does not provide for a specific interoperability research exception nor does it oblige right holders to provide necessary information to third party software developers. Instead, an administrative body is to be created<sup>106</sup>. This body will, upon request by third parties (such as software publisher and information service providers, but not consumers), have the authority to oblige undertakings employing technological protection measures to provide interoperability information. This is subject to certain security guarantees to which third parties must adhere<sup>107</sup>. Likewise, the French law does not allow users of technological protection measures to prohibit information on independent interoperable software, unless the security of the technological protection measures in question would be gravely affected<sup>108</sup>.

## **General Research Purposes**

France has also initially exempted any act of circumvention carried out for research purposes from criminal liability<sup>110</sup>. This is not reflected in any other Member State where research purposes permitted under existing limitations are subject to the general rules. It is not entirely clear from the statutory text whether and under what preconditions civil liability may be incurred. Following the decision by the French Constitutional Court, it

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<sup>107</sup> The previous French Bill foresaw a general obligation to provide information for inter-operability purposes upon request

<sup>108</sup> See the Report on France, **XD.II**, pp. 216.

<sup>110</sup> See Report on France, **XD.II**, p. 216.



was made clear that the meaning of research was restricted to research for purposes of cryptography rather than research uses regarding the work protected by technological protection measures.

### **Computer Program Exceptions**

Hungary has exempted all acts covered by a limitation concerning copyright in computer programs<sup>111</sup>. The provision upholds the right to make back up copies and to observe and study computer programs. Decompilation by a lawful user is likewise covered.

Finland likewise exempted acts falling within the exceptions of Article 5 (3) and 6 of the Computer Program Directive and thereby allows circumvention for purposes of reverse engineering of protected computer programs<sup>112</sup>.

In Lithuania, the limitation concerning the rights of lawful users to make back up copies of computer programs is recognised<sup>113</sup>.

In Member States which have not expressly excluded research activities from Article 6 (1), similar conclusions can be reached by interpreting Article 6 (3) in the sense that technological protection measures are not, in the normal course of operation, applied with the purpose of restricting research. This was the position taken in Germany in relation to cryptography research<sup>114</sup>.

## ***IV. Prohibition on Commercial Dealings in Circumvention Devices***

### **Initial Classification: Civil and Criminal Liability**

Article 6 (2) prohibits certain commercial dealings in circumvention devices. The provision is silent on whether such devices must facilitate copyright infringement or whether any technology that facilitates the circumvention of technological protection measures is covered. In addition, it prohibits certain services and advertisements for circumvention devices. The provision thereby relates, in contrast to Article 6 (1), to certain activities of a commercial nature. It is intended, thereby, to prevent acts that are preparatory in nature. However, there is very little guidance under the Directive as to what exactly Article 6 (2) protects and how the provision relates to the acts prohibited under Article 6 (1). There is, similarly, no express provision in any national implementation as to the legal nature of Article 6 (2). As a result, there is a lack of consistency of approach between the Member States. At the outset, the dogmatic approach in certain Member States may be distinct from the approach taken in those Member States where (if it exists at all) the criminal sanction reflects a mere qualification of a civil wrong. In those Member States where additional criminal provisions are in

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<sup>111</sup> Article 59 Copyright Act Hungary.

<sup>112</sup> See Report on Finland, **IXD.I**, p. 199.

<sup>113</sup> Cf. Article 75 (5) CA Lithuania, .

<sup>114</sup> cf. Wandtke/Bullinger-Loewenheim, UrhR, § 95a Rdnr. 17.

place, the effect may be an extension to third party liability even in cases where such third parties have no own commercial interest. This is potentially the case in those Member States where Article 6 (2) EUCD is not part of copyright law but imposes more extensive criminal provisions.

Nearly all Member States have copied Article 6 (2) literally. The provision is therefore present in all Member States, albeit with some deviations. In most member states, the prohibition has been transposed systematically into the respective chapter on liability for copyright infringement and as a provision that immediately precedes the respective prohibition on acts of circumvention, thereby following the structure provided for under the Directive. The respective implementation thus allows right holders to instigate civil proceedings. In some member states, acts falling in the ambit of Article 6 (2) constitute criminal offences only. Here, differences can be observed with regard to the systematic classification of such criminal rules. Cyprus, Estonia, the Czech Republic and Poland prohibit commercial dealings solely as a matter of criminal law.

Where stand alone criminal provisions exist, these provisions are only marginally delineated with Article 6 (2) EUCD and often go beyond it. Cyprus, as noted, only adopted Article 6 (2) EUCD as a criminal provision, albeit in the context of copyright law<sup>115</sup>. In the Czech Republic, where Article 6 (1) was not implemented, the relevant criminal provision applies with respect to a number of individual offences partially overlapping with Article 6 (1) EUCD though the provision restricts liability to instances where an intent to make commercial gain can be proven.<sup>116</sup> The additional element of intent was added in 2000. Notably, this is termed as a violation of copyright. In Estonia, the criminal provision additionally prohibits the use and possession of infringing devices<sup>117</sup>. In Spain, no significant departure from the text of Article 6 (2) EUCD in Article 240 of the Criminal Code can be ascertained. In particular in those Member States where the prohibition on commercial dealings *solely* forms part of criminal law (that is, in Cyprus, the Czech Republic, Estonia and Poland), it is likely that such approach gives rise to a broader understanding.

In other Member States that recognise additional criminal sanctions, these sanctions form part of copyright law and provide for a qualification in instances where more serious offences are concerned, and here the criminal sanctions are built upon and are complementary to the respective civil wrong under Article 6 (2) EUCD as implemented. However, further deviations as regards the scope of Article 6 (2), as implemented, can be discerned.

In Ireland, the Act, as noted, does not prohibit the private active circumvention. However, the unmodified criminal provision<sup>118</sup> penalises the facilitation of acts of

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<sup>115</sup> Article 16b Copyright Act Cyprus.

<sup>116</sup> Article 43 of the Czech Copyright Act

<sup>117</sup> Article 225 Criminal Code.

<sup>118</sup> Sec. 140 Copyright Act Ireland.

circumvention<sup>119</sup>, with the result that the principle tortfeasor under Article 6 (1) incurs civil liability whereas a person who – even privately – assists in the act of circumvention incurs criminal liability. A similar situation may arise under the Polish implementation, where Article 118 (1) Copyright Act imposes criminal sanctions for a range of commercial activities broadly relating to *devices or components [...] intended for a prohibited removal or circumvention of technological protection measures*, which includes acts done for non-commercial and private purposes. A user may incur criminal liability for distributing circumvention devices even if carried out in a private circle. The provision then extends liability to virtually any technology that enables the circumvention of any protection technology. In contrast to criminal sanctions applicable in other Member States as a consequence or qualification of a civil wrong, the intention (*mens rea*) merely pertains to the act of distributing etc. whereas an intention to circumvent in order to infringe must arguably be proven under Article 6 (1) as implemented.

It is, in conclusion, probable that sole standing criminal provisions will allow a much broader understanding of the respective prohibitions set forth in Article 6 (2) EUCD, as they present a component of the criminal law framework, where different dogmatic principles may apply. The reason is that an isolated prohibition under criminal law, above and beyond the principal rationale of protecting works and other subject matter against infringement may probably be construed literally, and thus be detached from the copyright framework. Additional liability rules in accordance with general criminal law doctrine might then apply to contributory acts and inducement even if no own commercial interest can be ascertained. Although it appears premature to attempt an assessment of how these additional provisions will be applied, it seems more likely that these provisions will not be read in conjunction with copyright doctrine, practically because such cases will be tried in criminal courts.

### Types of Commercial Dealings Covered

In all member states where Article 6 (2) was implemented, the types of commercial activities covered comply with the text of the Directive. Some differences can, however, be detected, specifically as regards the interface between the prohibition on acts of

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<sup>119</sup> Sec. 140 (4)(b) Copyright Act Ireland provides that anyone who ‘provides information, or offers or performs any service, intended to enable or assist a person to circumvent rights protection measures’ commits a criminal offence.

<sup>131</sup> See Report on Italy, **XVD.II**, pp. 294.

circumvention under Article 6 (1) and the scope of protection granted to right holders under Article 6 (2). As regards the respective wording

In Italy, Article 6 (2) EUCD was transposed in a complex way that may create certain additional problems regarding the interface between Article 6 (1) and 6 (2) as implemented. The Act replicates Article 6 (2) rather closely but, as noted, additionally prohibits the *purchase* of circumvention devices. The result here is that a seller for non-commercial purposes under Article 6 (2) is not liable whereas the purchaser is<sup>131</sup>.

France restricted its application of Article 6 (2) to devices that are specially designed to circumvent. Given the exclusion of research under the French implementation of Article 6 (1) and (2) EUCD, it follows that the manufacture of such devices is permitted.

The Polish implementation extends the definition under Article 6 (2) to all devices intended for a prohibited removal or circumvention of technological protection measures applied against the *playing* or copying of a work, which probably extends the meaning of what constitutes protected TPM's for the purpose of Article 6 (1).

The scope of § 95 a (3) of the German Copyright Act (= Article 6 (2) EUCD) was, for the first time, addressed in a decision by the Cologne Regional Court<sup>132</sup>. The claimant, who sought affirmation against right holders demanding damages for an alleged violation of § 95a (3), asserted that a non-commercial offer of a computer program on an Internet platform permitting the burning of CD's did not violate the provisions on technological protection measures. The software in question was used and had been put on the market before the implementation of § 95a. The claimant merely wished to resell it. The issue was whether offering the technology on an Internet platform constituted both advertising and possessing circumvention technology. The court first held that the meaning of possession under § 95a (3) related to the 'commercial' element under § 95 (3) and that possession for private purposes was outside the provision. The court then reasoned that § 95 (3) of the German Copyright Act was not restricted to commercial activities carried out with a view to make profit. The 'advertising' requirement was not to be understood identically to the wording of Article 2 (1) of the Council Directive on Misleading Advertising, where advertising is defined more narrowly. The court held that the meaning of 'advertising' related to any commercial communication facilitating sales, even if this was not associated with a business entity or a general intention to make profit. In addition, the court referred to the rationale of § 95a (3) as a normative provision abstractedly granting protection against any technology facilitating acts of circumvention. It is noteworthy that, thereby, the hypothetical use of the (rather outdated) burner software to be applied to CD's and other carriers which incorporate copy control mechanisms was sufficient despite the fact that the software had a much wider realm of application. The court did, however, not question nor comprehensively analyse whether the ability to 'burn' would have constituted the main purpose of the technology. The decision thus supports the rather generous interpretation of the provisions on dealings as a stand-alone provision that have no doctrinal connection with

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<sup>132</sup> LG Köln, (2006) Jur-PC Web-Dok. 49/2006, Nos. 1-63, available at [www.jur-pc.de](http://www.jur-pc.de).

the scope of § 95a (1). It asserts that § 95a (3) incorporates a separate tort of dealing in circumvention devices where, in contrast to § 95a (1), the abstract endangerment of violations of copyright is sufficient. In turn, the court found that, on the basis of constitutional law, the right to prevent and object to the use of circumvention technologies forms part of the constitutional property guarantee as applied to copyright. Most importantly, therefore, the court asserted that § 95a (3) gave right holders a subjective and individually enforceable right to prevent the use of circumvention devices.

### **Extension to Acts not Covered under Article 6 (2)**

Since most member states have included Article 6 (2) as a type of preparatory act, it would appear that the provision cannot be extended to scenarios that are not covered by its respective wording. As a recent decision by the Munich Higher Regional Court in the “Heise Online” case<sup>133</sup> indicates, a proper dogmatic characterization of the rationale of protecting technological protection measures is not a purely academic matter. The general prohibition on commercial dealings in circumvention devices permitted the court to construe § 95a (2) as a tort for which the concept of disturbance liability applies. The court was thereby in a position to prohibit the defendant the use of a hyperlink referring to a website stored on a server in the Caribbean, which offered a device to crack regional DVD encoding, despite the fact that the defendant clearly had no own commercial interest, and that the link was used in the context of an online press article discussing the product. The reasoning avoided discussion of the relationship between § 95a (1) and § 95a (3) (transposing Articles 6 (1) and 6 (2) EUCD). Relief was granted regardless of the fact that the circumvention of such technologies (in order to enable viewing) is arguably acceptable under § 95a (1). In employing the concept of disturbance liability, which allows the granting of injunctions and estoppel orders against illegitimate activities regardless of fault, the court likewise indicated that it considered § 95a (2) not as a statutorily establishment of certain preparatory acts connected to an infringement of copyright (or at least as an infringement of § 95a (1)). Accordingly, additional activities outside the statutory scope of § 95a (2) may constitute acts prohibited as contributory or preparatory acts. Arguably, this violates the principle of proportionality as foreseen in Recital 48 EUCD.

The general impression is that some Member States will grant more protection under Article 6 (2) than others, which indicates that the interaction and relationship between Article 6 (1) and Article 6 (2) needs clarification.

## **V. *Limitations and Technological Protection Measures***

Article 6 (4) of the Directive seeks to address the problem of users, who might otherwise benefit from certain limitations, being disenfranchised by the application of technological protection measures.

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<sup>133</sup> OLG München, (2005) MMR 2005, p. 768, (injunctive relief).

The solutions offered by Member States vary considerably. All Member States foresee the possibility of voluntary measures to be taken by right holders applying technological protection measures in order to secure access and use of works by certain beneficiaries. These may take the form of a voluntary measure in removing such measures or may be subject to certain agreements concluded between right holders and groups of beneficiaries. However, the extent to which such agreements may restrict beneficiaries from using works is uncertain. This depends upon two assertions: on the one hand, on the status given in national laws to limitations, on the other hand on the respective legal nature of technological protection measures.

Cyprus implemented, strangely, Article 6 (4) despite the fact that Article 6 (1) EUCD was not transposed. Article 6 (4) has not been implemented in Austria, the Czech Republic and Poland. In these Member States, the instant issue will be whether beneficiaries can immediately enforce such limitations before courts or whether the application of technological protection measures will simply prohibit excepted uses. The difference with Member States which provide a legal basis detailing procedures for beneficiaries is that the respective rights of both right holders and beneficiaries remain uncertain. This is because the relationship between technological protection measures and limitations is subjected to a procedure which excludes any notion of a self-help right in that such proceedings are mandatory. In Member States in which such indication is absent, the answer must be exclusively found in copyright law. Again, this depends on the nature of the respective limitations as understood in national law.

## **General Overview and Initial Observations**

Most Member States have followed the Directive and included specific provisions on how beneficiaries of certain limitations may obtain access to works.

The types of limitations covered vary, although no deviations from the list permitted under the Directive could be observed. Some Member States (France, Italy, the Netherlands and Spain) have included the private copying exception into the list of limitations covered, whereas others have opted for a more restrictive list<sup>134</sup>. Others yet, as noted, have abstained from specific regulations.

Divergences can be observed with regard to the terminology employed for describing the scope of 'rights' associated with technological protection measures. In some Member States, a positive obligation of right holders to grant access to works is applied, including Latvia and Lithuania. This reflects a preference for beneficiaries in that a positive obligation denotes a right to 'fully enjoy' benefits of limitations as foreseen in the statute.

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<sup>134</sup> See below, ID.VI, pp. 71 et seq.

<sup>136</sup> The Danish Copyright Licensing Tribunal may, according to Article 75d Copyright Act Denmark, then order right holders to provide the necessary means.

In the Scandinavian countries, the existence of a self-help right in case of non-compliance with an order indicates likewise that beneficiaries may more fully enjoy limitations, which in turn may indicate that contractual restrictions may be monitored more closely. Most Member States have, however, opted for a literal transposition.

Therefore, the scope of such obligation – and indeed whether it truly incorporates a positive obligation or whether the right holder is merely ‘requested’ to make necessary means available – depends upon more general observations. It should be noted, however, that even despite the seemingly more lenient statutory language no initial conclusion as to the legal nature of the technological protection measures provision in those countries can be drawn. For the time being, the potential effects of a provision merely permitting the application of technological protection measures are necessarily premature.

### **Procedural Means of Enforcement**

Procedural solutions for resolving disputes between right holders and certain beneficiaries have been implemented in some Member States that have transposed Article 6 (4). Most Member States have opted for a mediation or arbitration procedure before permitting the parties’ access to the judiciary.

There are in total five different routes Member States have chosen. These include direct access to the judiciary; access to specific administrative proceedings resulting in an administrative order that can be challenged before courts; arbitration procedures resulting in an award that can eventually challenged before courts; mediation and similar dispute resolution mechanisms; and absence of any specific provisions concerning Article 6 (4) (4) EUCD.

As noted, Austria has not transposed Article 6 (4) (4) EUCD but relies on future voluntary arrangements. It follows that beneficiaries of limitations will have immediate access to the judiciary even where voluntary measures are not in place; the Act necessarily does not contain a provision that makes a prior attempt to mediate the interests a precondition for locus standi. The same applies with regard to Slovakia. In Luxembourg, beneficiaries may proceed before the District Court and seek injunctive relief.

Similarly, immediate access to courts was the solution taken in Belgium, Cyprus, Ireland, Germany, Malta and Spain. These Member States do likewise not envisage any specific procedure, though here Article 6 (4) (4) has been transposed and an obligation to provide means and take voluntary measures has thus been implemented.

In other Member States, a complaints procedure before specific bodies with a power to order right holders has been established. These bodies fall in two categories. Either the procedure is governed under public law, and complaints are heard by public authorities, or a body is created on the basis of public law.

Sweden and the UK fall in the first category where complaints by beneficiaries are heard by the Secretary of State who has the power to order right holders to make means available. The UK implementation also made it clear that non-compliance with such order constitutes a breach of a statutory duty giving rise to damages.

In France, a special public body, the Authority for Regulation of Technological Measures will, as already mentioned, be responsible.

An arbitration procedure is foreseen in Finland. Similarly, dispute resolution mechanisms are foreseen in Denmark<sup>136</sup>, Estonia<sup>137</sup>, Greece<sup>138</sup>, Hungary<sup>139</sup>, Italy<sup>140</sup>, Latvia, Lithuania, Norway<sup>141</sup>, Portugal<sup>142</sup> and Slovenia<sup>143</sup>.

In Latvia, the beneficiary may choose, if the right holder refuses to make circumvention means available, to proceed either immediately to courts or to instigate mediation or arbitration proceedings. Lithuania envisages a voluntary dispute resolution by way of mediation.

The effect of the deviating solutions also has an impact as far as the procedural aspects are concerned, in particular with regard to the content and powers of the bodies hearing complaints. As noted, the solutions provided in Member States roughly differ between mediation, arbitration, administrative complaints procedure and proper judicial litigation. In case a mediation procedure is foreseen, the parties will usually enter into a contract. The situation may be different in case the proceedings are set up as arbitration, in which case the decision has the effect of a court order. However, arbitration is subject to a contractual arbitration agreement, which can as such be challenged. It is likewise uncertain whether a restrictive order by an arbitration panel in relation to the possibility of fully exercising limitations can be subsequently challenged in court.

## **Classification of Right Holder's Obligations**

As regards the scope of the obligation to provide the necessary circumvention tools, only very few member states indicate what the legal nature of such obligation is, and, in particular, whether it may be restricted by contract.

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<sup>137</sup> Proceedings are to be brought before the Copyright Committee if beneficiaries do not make means available in reasonable time, Article 80 (3) (4) Copyright Act Estonia.

<sup>138</sup> Mediation Procedure before the Greek Copyright Organisation (O.P.I.).

<sup>139</sup> Complaints are heard by the Hungarian Copyright Experts Council with subsequent access to the judiciary. The Council may give orders.

<sup>140</sup> A Copyright Committee was created to hear complaints. The Committee is composed of industry and right owner representatives.

<sup>141</sup> A Tribunal will be established at the Ministry of Culture, Article 53b Copyright Act Norway.

<sup>142</sup> Before the Commission for Mediation and Arbitration, Article 221 Copyright Act Portugal.

<sup>143</sup> The parties (right holders and user associations) are to agree upon the body to hear the complaint, Article 166b and 166c Copyright Act Slovenia. .



The respective obligation imposed on right holders to enable beneficiaries to make use of works as permitted under applicable limitations differs.

In Denmark, Finland, Norway and Estonia, as noted, the obligation to provide circumvention means is formulated as a positive obligation with an ensuing self-help right should right holders not comply. This seems to indicate that beneficiaries have a right to demand the full enjoyment of the limitation and that the scope of uses cannot, by way of contract or otherwise, be lawfully restricted. On the other end of the spectrum, the Latvian Copyright Act refers to the right of beneficiaries to ‘request’ removal, which does not appear to give beneficiaries an enforceable right. Here, the right holder has an exclusive right to use technological protection measures, which consequentially may restrict limitations by contract, which gives the mediation body a wide scope of discretion.

In all other member states, the scope of the obligation remains uncertain. Whether or not an obligation to grant access to works exists or whether certain restrictions can be imposed depends, arguably, on two factors: the status of limitations under national law and the specific dispute resolution.

As far as the status of limitations are concerned, only Belgium and Portugal make an express reference as to whether copyright limitations may be overridden by contractual agreement. In Portugal, a right holder cannot restrict limitations by contract, Article 75 (5) Copyright Act. This would consequentially apply to Article 6 (4) and result in a general obligation to make means available without restriction.

A potentially similar result may be achieved in Denmark where, as noted, limitations are perceived as mandatory to the extent that right holders cannot unilaterally (that is, by imposing terms and conditions in standard end user agreements) restrict the scope of limitations. A breach of a contractual condition that limits an otherwise applicable limitation will, in case the condition had been agreed upon, not constitute an infringement of copyright but merely a violation of the contract<sup>144</sup>.

The same may be true in Belgium where the mandatory nature of limitations is recognised in all cases but for works made available through interactive services. In all those Member States, the additional restriction to contracts relating to interactive services protected by access controls applies, in which case it appears that Article 6 (4) (4) takes precedence as far as the obligation to grant access to online content is concerned. In other cases, such as where works to which a copy control mechanism has been applied are purchased, the interaction between the general mandatory nature of

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<sup>144</sup> Article 75d of the Danish Copyright Act provides for specific proceedings in case beneficiaries are faced with applied technological protection measures. It therefore appears that in case a contractual clause restricts the ability of beneficiaries to make use of specific limitations, it is mandatory to commence proceedings. Beneficiaries are, however, given a self help right to circumvent if right holders do not make circumvention means available within four weeks after which proceedings have been instigated. See further Report on Denmark, VIID.II, p. 165.

limitations and the application of technological protection measures is open. What may be inferred in those Member States is, apprehensively, that there may be a certain tendency to give preference to beneficiaries on the basis of the general mandatory nature. This may result in a broader obligation to provide circumvention means, potentially to the full extent of any limitation covered.

In Germany, conversely, the scope of the obligation is unclear though it has been submitted that right holders may restrict beneficiaries' rights in contracts. The same is true for Italy and Spain.

In the United Kingdom, an administrative order by a public authority is foreseen. There is, however, currently no guidance on the scope of such order but it has been asserted that the Secretary of State may exert discretion. In Sweden, a similar complaints procedure before the Secretary of State is in place. In the Netherlands, a government ordinance is foreseen.

Clearly, the implementation of Article 6 (4) has led to divergent and potentially inconsistent approaches. Right holders may be able to agree on specific terms and conditions with beneficiaries in Member States where a mediation or arbitration procedure is provided, or where the extent to which a right holder must ensure that beneficiaries can exercise permitted uses is, as in the United Kingdom, subject to discretion. Whether such agreed restrictions on beneficiaries are enforceable depends on whether contractual agreements concluded between right holders and beneficiaries are subject to further scrutiny, which is an intricate and yet open issue. In Member States where immediate access to the judiciary is envisaged the situation is different because disputes will immediately be subjected to proper judicial scrutiny rather than a mere dispute resolution procedure. In this case, one solution is to declare contracts which exclude permitted uses void. Therefore, right holders cannot contract out of the obligation under Article 6 (4) to provide beneficiaries with the means to use the work. Beneficiaries may thus fully enjoy the limitations.

In Member States where an explicit solution detailing that right holders cannot contract out of obligations under Article 6 (4) is missing, the result will depend on the application of general contract law, and specifically whether restrictions on permitted uses constitute unfair terms. In effect, the scope of obligations imposed on the right holder significantly varies.

### **Individual Licenses in Online Contracts**

As regards online (interactive) services, all Member States which have implemented Article 6 (4) give precedent to contractual rules applying to such transaction. However, given that the clause was usually literally transposed, its proper interpretation remains unclear. One particular problem here concerns the scope of licenses in relation to works acquired through electronic delivery systems. It has been claimed that the general rules on limitations will be applicable and that, therefore, the individual licenses cannot extend

to technological protection measures applied to works acquired in such way<sup>145</sup>. Hence, if a work is downloaded from an interactive service, the scope of Article 6 (4) only extends to the service as such whereas, once such work is acquired by way of download, the beneficiary would be able to request the removal of any technological protection measures applied to the copy downloaded.

### **Database Exceptions**

No Member State has expressly excluded acts falling under the limitations of the exclusive rights under the Database Directive from Article 6 (1) EUCD. The only Member State where specific provisions – under Article 6 (4) EUCD – are in place allowing beneficiaries to claim removal of technological protection measures applied to databases is Spain. Whether the specific provisions on database limitations thus are covered is not entirely clear. As far as copyright protection of databases is concerned, this will depend on a number of issues. In member states where research exceptions have been made enforceable vis-à-vis applied technological protection measures, it is more likely that this will also encompass the research exception under the Database Directive if databases are treated in the same way as any other protected subject matter. As far as the database sui generis right is concerned, the issue will be more uncertain in member states where the database maker right is allocated to sole standing legislation. The questions remains undecided and will depend, in particular, on the specific manner in which database protection had been organised in national laws, and especially whether the respective national provides for a reference to databases.

The Database Directive also upholds certain minimum rights pertaining to the lawful user of a database protected under either copyright or the sui generis right. According to Article 15 of the Database Directive, these exceptions are mandatory and cannot be contracted out. The issue whether Article 15 Database Directive is now subject to the same individual licensing rules under Article 6 (4) (4) EUCD has not been addressed in any Member State.

## **VI. *Private Copying and Technological Protection Measures***

The issue of private copying has played a significant role in national debates on the implementation of the Directive, the main reason being that a levy scheme already exists. Circumvention for private copying purposes is explicitly prohibited in Belgium. In Norway and Sweden, technological protection measures do not protect against uses with the purpose to enjoy a work, which may include certain acts of private copying (such as ripping). Some Member States have included the private copying exception in the list of limitations for which specific rules are foreseen under Article 6 (4). This means that in some Member States the enforcement of the private copying exception may be subject

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<sup>145</sup>See further the Report on Germany, **XIB.III.1**), p. 224.

to a dedicated procedure. In most other Member States, notably Belgium and France, the position taken was to monitor future developments.

The ways in which Member States have addressed the interface between private copying limitations and applied technological protection measures differs significantly. Three main approaches can be discerned<sup>146</sup>. Whereas Austria, as noted, entirely opted not to regulate the interface between TPM's and limitation at all, other Member States – with the exception of France, Italy, the Netherlands and Spain - have excluded the private copying limitation from the list of limitations enforceable by beneficiaries against the application of technological protection measures under the respective implementation of Article 6 (4).

### **Private Copies under Article 6 (4) (2) EUCD**

Article 6 (4) permits member states to render existing private copying exception enforceable against applied technological protection measures. Only few member states have included the private copying exception or expressly introduced solutions dealing with the relationship between private copying and applies technological protection measures. The solutions in those member states where the private copying exception was included differ. In all other member states, as discussed in the following paragraph, the situation remains uncertain.

The private copying exception is, following Article 6 (4) EUCD, only listed as an enforceable limitation in France, the Netherlands, Italy and Spain as regards the making of digital copies.

The solutions here are the same as those applicable to other limitations. In France, an administrative procedure is foreseen before the ARMT, which will mediate between consumer and right holder interest groups. The availability of technological protection measures for right holders and the number of copies which can be lawfully made is subject to the discretion of that body.

In the Netherlands, the use of anti-copying devices will in the future be subject to specific regulations under a government ordinance. Likewise, details such as the number of copies that can be made are within the government's discretion.

In Italy, it appears that the right holder may demand in relation to private copies that only analogue copies may be created<sup>147</sup>. Moreover, the Italian Act only permits the making of copies from audiovisual works and sound recordings.

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<sup>146</sup> The following excludes the UK and Ireland where private copying exceptions do not exist.

<sup>147</sup> See Article 71<sup>sexies</sup> (3) in conjunction with Article 71<sup>sexies</sup> (4) CA Italy.

Spain has included the private copying exception in the list of enforceable limitations as such and users will therefore be able to find redress against copy protection mechanisms before courts. It should be noted that Spain has also introduced new levies on digital carriers to compensate for digital copying.

In Belgium, the King reserves the right to include the private copying exception by way of decree into the respective enumeration of enforceable limitations, though the law now makes it clear that any such inclusion will be subject to the three- step-test<sup>148</sup>.

### **TPM's and Private Copying**

In those Member States where the private copying exception is not enforceable against applied technological protection measures, a continued debate is predictable. There is, as noted, only very little – or, indeed, no - guidance as to the legal nature of private copying exceptions and technological protection measures, and hence as to their proper relationship. The following constitutes a brief survey of case law and national solutions on remaining concerns.

In Belgium, a 2004 court decision concerning the interaction between the private copying limitations and applied technological protection measures<sup>149</sup> concluded that the private copying exceptions was not enforceable by consumers. The claimants had asserted that the private copying exception amounted to an enforceable 'consumer right' and asked the court to instruct music publishers to remove copy control systems. The court reasoned that the private copying exception did not give a right to copy but immunity from prosecution, and that on that basis the remuneration to be paid under the levy scheme for private copying did likewise not allow the conclusion of a positive right.

In Germany, the Federal Constitutional Court (*BVerfG*) rejected an application for a constitutional complaint, asserting that the introduction of the provisions on technological protection measures violated certain constitutional rights of consumers, including the right to freely receive and impart with information and the right to property (in the purchased carrier)<sup>150</sup>. The application was rejected principally on the basis of formal issues under constitutional procedural law, but the court made some observations concerning the private copying exception. It indicated that the legislator would, under constitutional law, be normally at liberty to even fully prohibit the private copying of works (CD's and DVD's) and also asserted that there is very little reason to believe that the private copying exception amounted to a constitutionally protected right.

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<sup>148</sup> See Article 79bis (2) (2) Copyright Act Belgium and Report on Belgium, **IVD.V**, p. 134.

<sup>149</sup> Decision of the Tribunal de Première Instance of Brussels, 25 May 2004 – *Test Achats*. The decision was upheld by the Court of Appeals Brussels.

<sup>150</sup> *BVerfG*, 3 November 2005.

The French Court of Appeal's *Mulholland Drive* decision<sup>151</sup> initially indicated that the private copying exception (now subject to a mediation procedure) would permit the circumvention of technological protection measures. The court also asserted a right to make private copies from purchased carriers. However, the decision was overturned by the French Supreme Court<sup>152</sup>, which held that the private copying exception does not apply in cases where the copy would have the effect of conflicting with the normal exploitation of the work. The court based its deliberations on the issue of 'normal exploitation' on the perceived risks of the 'new digital environment' without further analysing other issues.

A Dutch decision likewise established that the right to make copies for private purposes is outweighed by Article 6 (2) EUCD (here: Article 29A of the Dutch Copyright Act) in that the offer for sale of software enabling users to circumvent copy control mechanisms contained in DVD's was found to violate Article 6 (2) as implemented<sup>153</sup>. The decision therefore confirmed that the private copying exception under Article 16c Copyright Act cannot be invoked against commercial dealings in circumvention devices.

In Slovakia, the private copying limitations 'shall not prejudice the "protection of measures to prevent unauthorized making of the copy of work as well as any other unauthorized act'. Consequentially, right holders applying technological protection measures can, in case such measure is circumvented, arguably rely upon an act of copyright infringement irrespective as to whether the person committing the act can rely upon a limitation. This result follows from the general classification of circumvention acts as an unauthorised act under copyright law.

## Consumer Protection Solutions

In Member States where Article 6 (4) (5) EUCD was not implemented, the responses to the legal interaction between provisions on private copying exception and copy control problem have partially been addressed.

In some cases, right holders are obliged to mark the applications of copy control devices on carriers. This was the route chosen in Germany. Failure to do so constitutes a breach of contract according to general civil code provisions and results, *inter alia*, in the contract being rescindable

It was also observed that the same result may be achieved in the majority of Member States where general contract and/or consumer protection laws may apply.

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<sup>151</sup> Court d'Appel, 22 May 2005.

<sup>152</sup> Decision of the Supreme Court (Cour de Cassation), First Civil Chamber, 28 February 2006,

<sup>153</sup> Hof Rotterdam, 21 July 2005, *Brein v Directwarehouse BV (Teledirekt)*, KG ZA 05-527 and KG ZA 05-567.

## **VII. Sanctions**

The sanctions imposed on acts of circumvention differ widely. All Member States foresee civil sanctions for the infringement of Article 6 (1) and 6 (2).

### **Sanctions for Acts of Circumvention**

In Austria, Belgium, Denmark, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Norway, Slovakia and Slovenia, the general copyright sanctions apply which normally foresee penal sanctions in cases where such infringement is committed in connection with running a business or on a commercial scale. In Germany, civil sanctions follow general copyright law whereas a new provision on criminal offences was introduced that is applicable predominantly to acts of a commercial nature.

Civil sanctions only apply in the Netherlands, which intentionally excluded criminal sanctions. The same applies in Estonia and Slovakia.

Specific criminal sanctions for acts of circumvention are provided (sometimes under Penal Law) in Finland, France<sup>154</sup>, Ireland, Italy<sup>155</sup>, Portugal, Spain and the UK<sup>156</sup>. In Finland and Norway, a general distinction applies between small and more serious crimes.

In Member States where the general criminal sanction under copyright law apply, there is a requirement that the act of circumvention is carried out either in the course of a business entity or, more narrowly, with an intention to make profit. In Sweden, the act of unauthorized circumvention carries a penal fine even in cases of gross negligence, though prosecution is subject to a public interest requirement<sup>157</sup>.

### **Sanctions for Commercial Dealings**

The situation as regards the enforcement of violations of Article 6 (2) reveals a diverse picture. Again, all member states provide for general civil sanctions. In some cases, no specific sanctions have been introduced. In some member states, criminal sanctions apply, and here, as noted previously, certain member states have regulated the sanctions applying under Article 6 (2) solely as a matter of penal law. In relation to Article 6 (2), specific criminal sanctions apply in Cyprus, Estonia, Ireland, Italy, Finland, France, Luxembourg, Poland, Portugal, Spain, Sweden and the UK;

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<sup>154</sup> The French law is restricted, as noted, to much narrower requirements, but carries a more severe fixed penalty of € 3750. See above, Report on France, XD.II, p. 216.

<sup>155</sup> In Italy, a violation of Article 6 (1) carries a fixed administrative fine of € 154, see Article 174ter (1) Copyright Act Italy.

<sup>156</sup> Sec. 296ZB (4) CDPA 1988: imprisonment up to three months or monetary fine upon summary conviction or conviction upon indictment.

<sup>157</sup> Article 57 (b) Copyright Act Sweden: imprisonment up to six months or monetary fine. .

In other Member States, including Hungary, Latvia, Lithuania, Malta, Norway, Slovakia, the sanctions applicable follow general copyright law. Here, it is usually a requirement that the alleged perpetrator, in order to incur criminal liability, must do so either with an intention to make profit or do so in the course of operating a commercial entity.

Specific reference to tort law as regards civil liability was also made in Luxembourg, the Netherlands and Poland.

Cyprus introduced specific criminal sanctions for the manufacture and distribution, as well as for the promotion of circumvention devices which carries a fine or imprisonment.

In the Czech Republic (where only offences in the ambit of Article 6 (2) EUCD have been introduced), both civil and criminal sanction require the additional proof of an intention to make economic gain. These conditions are, however, enshrined in the provision concerning commercial dealings and therefore present a general requirement for liability, rather than a qualification for more serious offences.

Other Member States distinguish, under copyright liability rules, between petty and serious offences. In Finland, for instance, the law distinguishes between penal and civil sanctions in accordance with the gravity of the offence<sup>158</sup>.

In France, a violation of Article 6 (2), as implemented, carries a fine of imprisonment up to six months, though, as noted, a number of specific exemptions apply.

In Germany, a new provision was introduced specifically applying to criminal offences against the protection of technological protection measures and rights management information. Criminal liability is incurred by acts done knowingly or, in the case of violating the provisions on rights management information, intentionally. The knowledge required pertains to the elements under Article 6 (2), as implemented, not to the knowledge and/or foreseeability of a subsequent violation of Article 6 (1). As far as criminal liability is concerned, acts violating Article 6 (2) must be committed on a commercial scale, i.e. normally in connection with running a business or with a view to make profit. The distinguishing feature here is whether the act was done for private purposes, as opposed to commercial purposes. As regards civil sanctions, Article 6 (2) is perceived as a strict liability rule. Thus, it is not required that, under Article 6 (2) as implemented, any subjective intention as regards the facilitation of a subsequent infringement of copyright by, for instance, purchasers of circumvention devices must be established. The more delicate details remain, however, subject to debate.

Ireland, as noted, imposes criminal liability additionally to violations of Article 6 (2) EUCD, as implemented, above and beyond of both the implementation of Article 6 (2)

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<sup>158</sup> See Article 56 (e) Copyright Act and Article 3 and 4 of Chapter 49 of the Finnish Penal Code, dealing with violations of Article 6 (1) and Article 6 (2) EUCD respectively according to the scale of the offence.



EUCD and wording of Article 6 (2) EUCD, on acts committed for assisting a third party in circumventing technological protection measures<sup>159</sup>.

## **E. General Sanctions for Copyright Infringement and Enforcement**

Articles 8 (1) and 8 (2) EUCD were necessarily already part of the existing legislation in all Member States. All Member States recognize the principle that copyright infringement attracts both civil and criminal liability. In most Member States, the law was not changed. General principles of copyright law and/or tort apply in these cases. The law was updated in only few Member States. Otherwise, liability of service providers under copyright law or tort law is governed by respective national provisions following the Directive on Electronic Commerce or general principles of tort law.

The injunction clause applicable to service providers as foreseen under Article 8 (3) EUCD was implemented in the Copyright Acts of Austria<sup>160</sup>, Greece<sup>161</sup> and Latvia, where now special means are available for securing interim relief against service providers. In other Member States, the obtaining of injunctive or final relief (i.e. ‘take down notices’) depends upon general principles of tort law as well as the specific national law on conduit, caching and hosting<sup>162</sup>. A specific ‘take down notice’ procedure is in place in Finland.

In Belgium, a similar provision applies<sup>163</sup>. The position here is that even if service providers escape primary liability under that Act, the possibility to be granted injunctive relief is not pre-empted<sup>164</sup>. The Netherlands employ general tort principles under which injunctive relief can be granted.

In the UK, Article 8 (3) EUCD was not implemented, though obtaining injunctive interim relief is possible under general principles of civil procedure law. Whether such relief is to be granted depends predominantly upon the discretion of the court.

There are two related problem areas which have recently been subject to case law. The first concerns issues of vicarious or contributory liability of service providers. The second concerns the identification of alleged infringers. The first issue arose in a Dutch case<sup>165</sup>. Here, it was argued that the making available of file sharing software amounted to direct or indirect (contributory) copyright infringement. This was rejected on the basis that the software, as such, was not merely a tool for facilitating copyright infringement but had substantial other uses.

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<sup>159</sup> Sec. 140 (4) Copyright Act Ireland.

<sup>160</sup> § 91 Copyright Act Austria.

<sup>161</sup> Article 64 A Copyright Act Greece.

<sup>162</sup> Article 12 – 14 of the Directive on Electronic Commerce.

<sup>163</sup> Article 87 Copyright Act Belgium

<sup>164</sup> Court of First instance Brussels, *SABAM v SA Tiscali*, 24 June 2004.

<sup>165</sup> Hof Amsterdam, 28 March 2002 (*Kazaa vs. BUMA*) LJN: AE0805.

The second issue is not regulated under European copyright law but perceived as a data protection issue<sup>166</sup>. A recent Irish case confirmed that, under the condition that there is very clear proof of copyright infringement, ISP's have an obligation to disclose identities<sup>167</sup>. This appears to be specific to common law jurisdictions where it is recognized that a party, even without having incurred liability, has a duty to assist the injured party in seeking redress<sup>168</sup>. Similarly, a Dutch court held that ISP's may have a duty to disclose if the content of hosted web sites is clearly unlawful in accordance with Article 14 (1) of the Electronic Commerce Directive<sup>169</sup>. In relation to copyright infringement by file sharing, the Court of Appeal of Amsterdam rejected the argument that ISP's had a general duty to disclose details<sup>170</sup>.

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<sup>166</sup> On the opposite solution, cf. Sec. 512 (g) (1) of the US Copyright Act, which obliges service providers to provide right owners with the identity of alleged infringers under certain preconditions.

<sup>167</sup> The High Court (Commercial), *EMI Records (Ireland) Limited, Sony BMG Music Entertainment (Irl) Limited, Universal Music Ireland Limited, Warner Music Ireland Limited v Eircom Limited and BT Communications Ireland Limited*, 8 July 2005.

<sup>168</sup> Referred to as 'Norwich Pharmacal Order'.

<sup>169</sup> Hof Amsterdam, *Lycos v Pessers*, 2 February 2006. The case concerned defamation issues.

<sup>170</sup> Gerechtshof Amsterdam, 13 July 2006, 1457/05 KG (*Brein vs. UPC et al.*) available at [www.rechtspraak.nl/ljn.asp?ljn=AY3854](http://www.rechtspraak.nl/ljn.asp?ljn=AY3854); See also: Rechtbank Utrecht, 12 July 2005, 194741/KGZA 05-462, available at: [www.rechtspraak.nl/ljn.asp?ljn=AT9073](http://www.rechtspraak.nl/ljn.asp?ljn=AT9073).

## II SCHEMATIC OVERVIEWS

### A. Table I – Status of Implementation

	In force	Official Source	Remarks
AUSTRIA	1 July 2003	Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte i.d.F. der UrhG-Novelle 2003	
BELGIUM	23 May 2003	Loi du 22 mai 2005 transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information, Moniteur Belge, 27/05/2005, p. 24997.	
CYPRUS	1 May 2004	Copyright and Related Rights (Amendment) Law of 2004 (Law n° 128(I)/2004, Official Gazette of the Republic of Cyprus, n° 3850, 30.04.2004)	
CZECHIA	1 December 2000 [partially]	Law No. 131/2000 Coll. of 7 April 2000 on Copyright, Rights related to Copyright and on the Amendment of Certain Laws.	Articles 6 and 7 EUCD have not been implemented.
DENMARK	22 December 2002	Act no 1051 of 17 December 2002,	
ESTONIA	29 October 2004	Act of 22 September 2004 (RT I 1999, 54, 580) which came in force 29 October 2004, to amend the Copyright Act of 11 November 1992 (RT2 1992, 49, 615, consolidated text RT I 2000, 16, 109)	
FINLAND	14 October 2005	Law 14.10.2005/821, amending the Copyright Act (8.7.1961/404); Law 14.10.2005/822 amending chapter 49 in the Criminal Code; decree 1036/2005, amending the Copyright Decree.	
FRANCE	4 August 2006	LOI n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1), J.O. no. 178, du 3 août 2006 page 11529.	

	In force	Official Source	Remarks
GERMANY	13 September 2003	Act amending the Law on Copyright and Related Rights 1965 of 10 September 2003.	Currently, the second basket has been prepared which will be introducing new rules on limitations and levies. The bill was introduced for a first reading into Parliament on 15 June 2006.
GREECE	10 October 2002	Article 81 of Law 3057/2002 (Amendment and Completion of Law 2725/1999, regulation of matters pertaining to the Ministry of Culture and other provisions) (Official Gazette A' 239/10.10.2002)	
HUNGARY	1 May 2004	Act CII amending the Copyright Act 1999 (Act No. LXXXVI of 1999, Official Gazette ( <i>Magyar Közlöny</i> ) No. 61	
IRELAND	16 January 2004	Statutory instrument No. 16/2004 (European Communities (Copyright and Related Rights) Regulations 2004	The Copyright Act 2000 transposed both WCT/ WPPT and the then Draft EUCD partially.
ITALY	9 April 2003	Legislative decree No. 68 of 9 April 2003 ( <i>Decreto Legislativo 9 aprile 2003, n. 68, "Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione", pubblicato nella Gazzetta Ufficiale n. 87 del 14 aprile 2003</i> ) amending the Basic Copyright Law Act (Act No. 633 of 22 April 1941 as amended)	
LATVIA	22 April 2004	Amendments to the Copyright Law Act of 22 March 2003 and of 22 April 2004.	
LITHUANIA	1 January 2004	Law amending the law on copyright and related rights, No. IX-1355, 5 March 2003	
LUXEMBOURG	18 April 2004	Act amending the Law on Author's Rights, Related Rights and Databases (Loi du 18 Avril 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948, Loi du 18 avril 2004).	
MALTA	2 September 2003	Inserted into the Copyright Act under Part XVIII of Act IX of 2003, An Act entitled the Various Laws (Amendment) Act)' Government Gazette of Malta, No. 17467.	

In force		Official Source	Remarks
NETHERLANDS	1 September 2004	Act of 6 July 2004 amending the Copyright Act (Wet van 23 September 1912, houdende nieuwe regeling van het Auteursrecht), <i>Stb.</i> 2004, 336	
NORWAY	1 July 2005	2005:97 “Lov om endringer i åndsverkloven m.m.” (“Act on amendments in the Copyright Act etc”), Lovtidend (the official legal gazette) June 17, 2005, p. 481 ff	
POLAND	1 April 2004	Act of 1 April 2004 on the alteration of the Law on Copyright and Neighbouring Rights (2004 Act); Act of 28 October 2002 on the alteration of the Law on Copyright and Neighbouring Rights (2002 Act) = ustawa z dnia 1 kwietnia 2004 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 91, Poz. 869), ustawa z dnia 28 października 2002 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 197, Poz. 1662).	
PORTUGAL	24 August 2004	Law 50/2004 of 24 August 2004.	
SLOVAKIA	1 January 2004	Act No. 618/2003 of 4 December 2003	
SLOVENIA	24 April 2004	Act amending the Copyright and Related Rights Act, Official Gazette RS No. 43/04.	
SPAIN	7 July 2006	Ley 23/2006 de 7 julio, B.O.E. num. 162, 8 julio 2006, 25561	.
SWEDEN	1 July 2005	Government Bill no 2004/2005:110, amending Act 1960:729 on Copyright in Literary and Artistic Works of 30 December 1960	
UK	31 October 2003	Statutory Instrument SI 2003/2498 (“The Copyright and Related Rights Regulations 2003). Minor amendments were made under the Performances (Moral Rights etc.) Regulations 2006 (SI 2006/18)	

## B. Table II – Implementation of Exclusive Rights

	Reproduction	Communication to the Public	Distribution	Exhaustion of Distribution Right	Remarks
AUSTRIA	§ 14 (1)	§ 18 a	§ 17 (1)	§ 17 (2)	Austria only implemented the ‘making available aspect’ of Article 3 EUCD.
BELGIUM	Article 1 (1) (1)	Article 1 (1) (3)	Article 1 (1) (newly introduced)	Article 1 (1) (newly introduced)	Belgium did not explicitly provide for exhaustion and a specific distribution right.
CYPRUS	Article 7 (1), 7F	Article 7 (1) (a) (vi)	Article 7 (1) (a) (iii)	Article 7 (1) (b)	
CZECHIA	Article 12 (4) (a)	Article 18, 19 – 21.	Article 12 (4) (b)	Article 12 (4)	No Community Exhaustion.
DENMARK	Article 2 (2) (3); 2 (2) (4) .	Article 2 (3) – 2 (4)	Article 2 (3) (1)	Article 19	International exhaustion principles changed.
ESTONIA	Article 13 (1) (1)	Article 13 (2) (9)	Article 13 (2) (4)	Article 13 (1) Recital 1.	
FINLAND	Article 2	Article 2	Article 2	Article 19	
FRANCE	Article L-122-5	Not implemented – covered by representation right	Not implemented – covered by droit de destination	Article L-131-9 for copyright; Article 122-6 for software; Article 211-6 for related rights	Temporary copying not mentioned
GERMANY	§§ 16 (1), 69c	§ 19a (new)	§ 17 (1)	§ 17 (2)	
GREECE	Article 3	Article 3h	Article 3d (amended)	Article 3d (amended)	
HUNGARY	Article 18	Article 26 (8)	Article 23	Article 23 (5)	Source copy must be legal according to Copyright Experts Council.
IRELAND	Sec. 39	Sec. 40	Sec. 40	Sec. 41	Article 18 refers to Internet” communications; no general public communication right; continued application of rights in “cable programmes”.
ITALY	Article 13	Article 16, 16 (1)	Article 17	Article 17 (3)	Exhaustion excludes “intangible copies”

	Reproduction	Communication to the Public	Distribution	Exhaustion of Distribution Right	Remarks
LATVIA	Article 15(1)(9)	Article 15 (1) (1)	Article 15 (1) (4)	Article 32	Exhaustion termed as copyright limitation
LITHUANIA	Article 15 (1)(1)	Article 15 (1) (8), definition in Article 2 (29)	Article 15 (1) (5)	--	Community Exhaustion not recognised
LUXEMBOURG	Article 3 (1)	Article 4 (2)	Article 3 (5)	Article 3 (5)	
MALTA	Article 7 (1) (a)	Article 7 (1) (f)	Article 7 (1) (c)	Article 8 (1)	
NETHERLANDS	Articles 13-14	Article 12 (not amended)	No distinct right; part of broader exclusive right under Article 12	Article 12b.	
NORWAY	Article 2 (1)	Article 2 (2)	Article 2 (3) (a)	Article 19	
POLAND	Article 50 (1)	Article 50 (3)	Article 50 (2)	Article 51 (3)	No changes made; issue of transient copying remains unresolved
PORTUGAL	Article 68 (2)(i)	Article 68 (2) (j)	Article 68 (2) (f)	Article 68 (5)	
SLOVAKIA	Article 18 (2a)	Article 18 (2c); definition in Article 3 (14)	Article 18 (2b)	Article 23	Community exhaustion not recognised.
SLOVENIA	Article 23 (1), 23 (2)	Article 32a	Article 24 (1)	Article 43	
SPAIN	Article 18 (update to include temporary and indirect copies); Article 107 (1) for performing artists	Article 20 (2) (i) Article 108 (1) for performing artists	Article 19 (1); Article 109 (1) for performing artists	Article 19 (2); Article 109 (2) for performing artists.	No changes will be made to exclusive rights.
SWEDEN	Article 1	Article 2	Article 1	Article 19	No changes made
UNITED KINGDOM	Sec. 17 (1), 17 (6) (temporary copies)	Sec. 20	Sec. 18 (1)	Sec. 18 (3)	Complex regulation of communication rights. Copyright Act includes rights in “online broadcasting”

### C. Table III – Implementation of Articles 5 (1) and 5 (2) EUCD

	Article 5 (1)	Article 5 (2) (a)	Article 5 (2) (b)	Article 5 (2) (c)	Article 5 (2) (d)	Article 5 (2) (e)	Remarks
AUSTRIA	§ 41a	§§ 42, 42a	§§ 42, 42a	§ 47(2)	--	--	Third party copying is permitted for private copying defence; uncertainty as to legality of source copy
BELGIUM	Article 21 (Article 46 for neighbouring rights)	Article 22 (1) (4)	Article 22 (1) (5)	Article 22 (1) (8)	Article 22 (1) (10)	Article 22 (1) (13)	Legality of source copy undecided
CYPRUS	Article 3 (9)	Article 7 (2) (a); special rules on reprography in Article 7 (16) (p)	Article 7 (2) (a)	Article 7 (2) (a); Article 10 (j) [partial coverage]	Article 7 (2) (11)(k)	Article 7 (2)(17)(q)	No levy system in place for private uses
CZECHIA	Article 37 (2)(a)	Article 30 (1)	Article 30 (1), Article 30 (3)	Article 37 (1)	--	--	Broad private use exception which permits copies made on demand by third parties
DENMARK	Article 11a	Article 12, special rules on photocopying in Article 50-52	Article 12, 39 (1)	Article 16, 33	Article 31 (1)	Article 15	
ESTONIA	Article 18 (1)	Article 18 (3) (1)	Article 18 (1) (5)	Article 20	Article 23 (1)	--	
FINLAND	Article 11A	Article 12; special rules on photocopying in Article 13	Article 12;	Article 13-16, 16 a	Article 25 (f)	Article 15	Legal source copy requirement for private copying; third party copying



	Article 5 (1)	Article 5 (2) (a)	Article 5 (2) (b)	Article 5 (2) (c)	Article 5 (2) (d)	Article 5 (2) (e)	Remarks
							permitted; private copying not deemed subjective right (Article 11 (5); distance education provision in Article 14 (4))
FRANCE	Article L-122-5 6°	Article L-122-5 2°	Article L-122-5 2°	Article L-122-5 8°	Article L-214-1 (broadcasts only)	--	
GERMANY	§ 44a	§§ 53 (1), 53 (2)	§§ 53 (1), 53 (2)	§§ 53 (2)(2), 58 (2)	§ 55 [archiving purposes]	§ 47 (1)	Commercial copying permitted in relation to reprographic copies; new § 53a will permit document delivery services; source copy must not be obviously illegal for private purpose limitation
GREECE	Article 28B	Article 18(1)	Article 18 (1) [covers all private uses; unamended]	Article 22, 23	--	--	Copies on paper may be made for commercial purposes;
HUNGARY	Article 35 (6)	Article 35 (1); Article 21	Article 35 (1) [broad private copying and public performance provision]	Article 35 (4)	Article 35 (7)	Article 38 (1) [partially]	
IRELAND	Sec. 87 (1)	--	--	Secs. 53-58 and Secs. 59ff. in relation to libraries and archives	Sec. 100	Sec. 97	

	Article 5 (1)	Article 5 (2) (a)	Article 5 (2) (b)	Article 5 (2) (c)	Article 5 (2) (d)	Article 5 (2) (e)	Remarks
ITALY	Article 68bis (1)	Article 68 (1) in relation to literary works;	Article 71sexies (1) [in relation to phonograms and videograms]	Article 68 (1)	Article 55 (a)	Article 71quater	Numbers of copies restricted; third party copying not permitted
LATVIA	Article 33	Article 35	Article 34 (1)	Article 19 (1)(4); Article 23	Article 19(1)(8); Article 27	--	
LITHUANIA	Article 29	Article 23(1)	Article 20 (1)(1)	Article 21 (1) (2)	Article 29 (1) (2)	--	
LUXEMBOURG	Article 10 (5)	Article 10 (4)	Article 10 (4)	Article 10 (10)	Article 10 (9)	--	
MALTA	Article 9 (1) (a)	Article 9 (1) (b)	Article 9 (1) (c)	Article 9 (1) (d)	Article 9 (1) (e)	Article 9 (1) (f)	
NETHERLANDS	Article 13a	Article 16h - 16m; Article 16b (1); special rules on home taping in Articles 16c-16g	Article 16b (1)	Article 16n	Article 17b	--	Transient copy limitation implemented as general exemption from reproduction right; reprography copying permissible for legal entities; third party copying permitted except for sounds or images
NORWAY	Article 11a [excludes computer programs and databases]	Article 12 (1)	Article 12 (1); Article 12 (2)	Article 16 [partially]	Article 31	Article 15 [partially]	Source copy must be lawful; private copying excluded if TPM in place.
POLAND	Article 23	Article 23, 30 (1)	Article 23, 20, 20 (1)	Article 27 [specific rules for documentation centres covering copying and making available];	Article 22 § 1	--	

	Article 5 (1)	Article 5 (2) (a)	Article 5 (2) (b)	Article 5 (2) (c)	Article 5 (2) (d)	Article 5 (2) (e)	Remarks
				additional rules for libraries etc. in Article 28 (2)			
PORTUGAL	Article 75 (1)	Article 75 (2)(a)	Article 81 [unamended]	Article 75 (2)	Article 189 (1) [PARTIALLY]	Article 75 (2) (p)	Source copy must be legal
SLOVAKIA	Article 32	Article 24 (1) (B)	Article 24 (1) (A)	Article 31	Article 69 (2)	--	
SLOVENIA	Article 49A	Article 50 (1) [covering “photographic techniques”]; Article 50 (2) (1)	Article 50(2)(2)	Article 50 (3)	--	--	
SPAIN	Article 31 (1)	No specific reprography clause; falls under Article 31 (2)	Article 31 (2) and claim for compensation in Article 25	Article 37 (3)	Article 37 (2) [PARTIALLY]	--	
SWEDEN	Article 11A	Article 12 [GENERAL PRIVATE COPYING EXCEPTION]	Article 12	Article 12	Article 26e	--	Article 12 goes beyond Article 5 (2) (B); source copy must be legal; third parties may make copies on behalf of beneficiaries
UNITED KINGDOM	Sec. 28A	--	-- [sec. 70 permits reproductions of broadcasts for purposes of time shifting]	Secs. 37-44 [marginally amended]	Sec. 68	--	

## D. TABLE IV – Implementation of Article 5 (3) EUCD

### I. ARTICLES 5 (3) (A) – 5 (3) (G)

	Article 5 (3) (a)	Article 5 (3) (b)	Article 5 (3) (c)	Article 5 (3) (d)	Article 5 (3) (e)	Article 5 (3) (f)	Article 5 (3) (g)
AUSTRIA	§§ 42 (2), 42 (6)	§ 42d	§ 42c	§ 46	§ 41	--	--
BELGIUM	Article 22, §1er, 4 <sup>o</sup> ter covers now digital copies.	Article 22 (1) (11)	Covered under Article 22 (1) (1)	Article 21 (1)	--	--	Article 22 (1) (2)
CYPRUS	Article 7 (2) (18)	Article 7 (2) (19) (s)	Article 7 (2) (10) (j)	Article 7 (2) (6) (f)	Article 7 (2) (13) (m)	Article 7 (2) (14) (n)	--
CZECHIA	Articles 31b, 31c, 35 (5) partially cover 5(3)(a)	Article 37 (2) (c)	Article 34 (1) (b), 34 (1) (c) (partially)	Covered under Article 31b (criticism) and Article 31b (private copying)	Article 34 (1) (a)	Article 34c	Article 35 (1)
DENMARK	Article 11 (2), 13, 18, 21, 23 (1) cover 5(3)(a)	Article 17	Article 23(3), 23(4) (unamended)	Article 22	Article 26-28	Article 32	Article 21
ESTONIA	Article 19(2), 19 (3)	Article 19(9)	Article 19 (1)	Article 19(3)(1)	Article 19 (8)	Article 20 (1)	--
FINLAND	Article 14 (1), 16(a)-16(d), 18, 21	Article 17	Article 13, 13a (unamended); 23, 25b	Article 22; in relation to works of Article, Article 25	Article 25(c)	Article 25(c)	Article 21(1)
FRANCE	Article L-122-5, 3 <sup>o</sup> (e)	Article L-122-5-7 <sup>oo</sup>	Article L-122-5-3 (b) [press reviews]	Article L-122-5-3 <sup>o</sup> (a) ; a general	Article L-331-4 CPI (covers all	Article L-122-5-3 <sup>o</sup> (c) (remains	--

	Article 5 (3) (a)	Article 5 (3) (b)	Article 5 (3) (c)	Article 5 (3) (d)	Article 5 (3) (e)	Article 5 (3) (f)	Article 5 (3) (g)
			123-5-3 <sup>o</sup> and Article 122-5-9 <sup>o</sup>	quotation right is permitted under case law	Intellectual Property Rights)	unchanged)	
GERMANY	Falls under copying for private uses, §§ 53(2)(4); 53(2)(3); in addition, § 52a allows making available for scientific purposes.	§ 45a (new)	§§ 49, 50 (unchanged)	§ 51 (unchanged)	§ 45 (unchanged)	§ 48 (unchanged)	§ 46 (unchanged)
GREECE	-- [partially covered under private copying]	Article 28A, restricted to blind, deaf, mute people	Article 25 (unchanged)	Article 19	Article 24	Article 25	Article 27
HUNGARY	Article 34 (2), 35 (5) (Reprography only)	Article 41 (1)	Article 37 (1) (unchanged), Article 36 (2) (new)	Article 34 (1)	Article 41 (2)	Article 36 (1)	Article 38
IRELAND	[--] Partially covered under educational uses, Secs. 53-58	Sec. 104 (supply of additional copies from libraries)	[--] falls under criticism and review defence, sec. 51	-- falls under criticism and review defence, sec. 51	Sec. 71, 72	Sec. 98 (and criticism and review)	Sec. 93
ITALY	Article 68 (1), 68 (2) (private copying); Article 70 (1), 70 (2)	Article 71bis	Article 65(1)	Article 70	Article 67	Article 66	--
LATVIA	Article 19(1)(2)	Article 19 (1)(3),	[--] (general	Article 19 (1) (1),	Article 19 (1)(5),	Article 20 (2) (2)	Article 10 (1) (7),

	Article 5 (3) (a)	Article 5 (3) (b)	Article 5 (3) (c)	Article 5 (3) (d)	Article 5 (3) (e)	Article 5 (3) (f)	Article 5 (3) (g)
		22	private copying limitation, Article 19 (1))	20 (1) (1) (quotations and fragments)	24 (judicial proceedings only)		26 (1) partially cover this.
LITHUANIA	Article 22(1)(1) (reproduction only)	Article 22 (1) (2) (restricted to research purposes)	Article 24 (1) (1) (new)	Article 21	Article 27	Article 24 (1) (3)	Article 26
LUXEMBOURG	Article 10 (2)	Article 10 (11)	Article 10 (3)	Article 10 (1)	Article 10 (12)	Article 10 (8)	--
MALTA	Article 9 (1) (h) (distribution permitted)	Article 9 (1) (i) (distribution permitted)	Article 9 (1) (j)	Article 9 (1) (k)	Article 9 (1) (l)	Article 9 (1) (m)	Article 9 (1) (n)
NETHERLANDS	Article 16 (includes digital copies)	Article 15i	Article 15, 16a	Article 15a	--	Article 15b (official speeches)	Article 17c
NORWAY	Partially covered under Article 23 (1) – photographs and fine art only	Article 17	Article 23a; partially also covered under Article 25 (if incidental)	Article 22	--	Official Speeches are not subject to copyright	-- [some coverage under Articles 18 and 21.
POLAND	Article 29 (2), 29 (2) (1)	Article 33	Partially covered under Article 25 (1)	Article 29 (1) (Partially)	Article 33 <sup>2</sup>	Covered under Article 25	Article 31 (amended)
PORTUGAL	Article 75 (2) (f), 75 (2) (h)	Article 75 (2) (i)	Article 75 (2) (m)	Article 75 (2) (n)	Article 75 (2)(g)	Article 75(2)(j)	
SLOVAKIA	Article 25	Article 29	Article 33 (2)(a), 33 (2)(b); no limitations as to purpose; Article	Article 25	--	Article 33 (1)(c)	Article 30 (1)(a)

	Article 5 (3) (a)	Article 5 (3) (b)	Article 5 (3) (c)	Article 5 (3) (d)	Article 5 (3) (e)	Article 5 (3) (f)	Article 5 (3) (g)
			69 (2a) in relation to broadcasts				
SLOVENIA	--	Article 47a	Article 56 (partially)	--	--	--	--
SPAIN	Article 32 (1) (quotations) and Article 32 (2) reproductions by teaching staff	Article 31bis (3)	Article 33 and exclusion of factual news under Article 13	Partially covered under Article 32 (1)	Article 31bis (1)	Article 33 (2)	Article 38
SWEDEN	Article 18 (in relation to works of fine art, Article 23)	Article 17	Article 23	Article 22	Article 26	Article 26	Article 21
UNITED KINGDOM	Sec. 29, sec. 35 amended in relation to broadcast	Secs. 31A – 31F (“visually impaired”)	Sec. 30 (criticism and review) (not changed)	Falls under criticism or reporting current events.	Secs 50 ff., not changed	Criticism or review defence	Sec. 62 (unchanged)

## II. ARTICLES 5 (3) (H) – 5 (3) (O); ARTICLE 5 (5)

	Article 5 (3) (h)	Article 5(3)(i)	Article 5(3)(j)	Article 5(3)(k)	Article 5(3)(l)	Article 5(3)(m)	Article 5(3)(n)	Article 5 (3) (o)	Article 5 (5)
AUSTRIA	§ 54 (5)	--	§ 54 (1)	Free use	§ 56 (1)	--	--	--	Applied in practice
BELGIUM	Article 22-1-2	--	Article 22-1-12	Article 22 § 1 <sup>er</sup> 6'	--	--	Article 22-9 (new)	--	Applied in practice
CYPRUS	Article 7 (2) (2) (b)	Article 7 (2) (4) (d) (narrower)	--	Falls under Constitutional Rights	--	--	Article 7 (2) (18)	--	Applied in practice
CZECHIA	Article 33 (1)	--	Article 32	--	Article 30 (2) (b)	--	--	--	Article 29
DENMARK	Article 24 (2)	Article 23 (4), 25	Article 24 (1)	Caricatures are treated as new works	--	Article 24	Article 21 (3)	Article 18 allows uses in song booklets	--
ESTONIA	--	--	--	--	--	--	Article 20 (3) ("on order")	--	--
FINLAND	Article 25a (3)	Article 25 (2)	Article 25a (1)	General principle	Article 20 permits "display"	Article 25 (e) (partially)	Article 16b (in libraries)	--	Applied by courts
FRANCE	Article L-123-5 (new)	--	Article L-122-5 3' d	Article L-122-5, 4'	--	--	Not covered under copyright law; to be permitted under public law relating to libraries etc.	--	Article L-122-5, 9° al. 4.



	Article 5 (3) (h)	Article 5(3)(i)	Article 5(3)(j)	Article 5(3)(k)	Article 5(3)(l)	Article 5(3)(m)	Article 5(3)(n)	Article 5 (3) (o)	Article 5 (5)
GERMANY	§ 59	§ 57	§ 58	§ 24 (free use)	§ 56	--	§ 52b partially covers communications to small groups of researchers; 5-3-n has not been transposed.	--	Status is debated
GREECE	Article 26	--	Article 28	--	--	--	--	--	Article 28C
HUNGARY	Article 68	Article 37 (2)	Article 34 (1) (may be covered by quotation right)	--	--	--	Article 38 (5); will potentially be broadened to interlink institutions	--	Article 33 (2)
IRELAND	Sec. 93	Sec. 52	Sec. 94	Falls under criticism and review etc.	Sec. 93	--	--	--	--
ITALY	--	--	--	Article 70 (quotation)	--	--	Article 71 ter	--	Article 71nonies
LATVIA	Article 19 (1) (6); Article 26 (1)	--	--	--	--	--	--	--	--
LITHUANIA	Article 28 (1) (1)	Article 24 (1) (4)	--	Article 25	Article 25 (1)(5)	Article 37 (1)(2)	Article 22 (1)(3)	--	--
LUXEMBOURG	Article 10 (7)	--	--	Article 10 (6)	--	--	Article 10 (14)	--	Article 10 (2)

	Article 5 (3) (h)	Article 5(3)(i)	Article 5(3)(j)	Article 5(3)(k)	Article 5(3)(l)	Article 5(3)(m)	Article 5(3)(n)	Article 5 (3) (o)	Article 5 (5)
MALTA	Article 9 (1) (p)	Article 9 (1) (q)	Article 9 (1) (r)	Article 9 (1)(s)	Article 9 (1) (t)	Article 9 (1) (u)	Article 9 (1) (v)	--	Article 9 (3)
NETHERLANDS	Article 18 (broader)	Article 18 <sup>a</sup>	Article 23	Article 18a	--	--	Article 15h	--	Applied in case law
NORWAY	Article 24 (3)	Article 25	Article 24	Applicable in doctrine; no case law	--	Article 29	-- (subject to future implementation)		Not perceived as substantive rule
POLAND	Article 33 (1)	--	Article 33-3	Article 29 § 1	Article 33-4	Article 33-5	Article 28, 28 (3) (in schools)		Article 35 ("two-step-test")
PORTUGAL	Article 75 (2) (g)	Article 75 (2) (r)	Article 75 (2) (l)	Free use	Article 75 (2) (s)	Article 75 (2) (t)	Article 75 (2) (o)	--	Article 75 (5)
SLOVAKIA	Article 27	Article 26 (1)	--	--	--	--	Article 37	--	Article 38
SLOVENIA	--	--	Article 54	--	--	Article 44	----	--	--
SPAIN	--	Article 34	--	Article 39	--	Article 35	Article 37 (3)	--	
SWEDEN	Article 24	Article 20a	Article 24	Permitted under case law	--	Some aspects covered under Article 24	--	--	--
UNITED KINGDOM	Sec. 62	Sec. 31	Partially covered under Sec. 63	Covered under general defences	--	Partially covered under Sec. 62	--	--	Not perceived as substantive rule by government

## E. TABLE V – Implementation of Article 6 EUCD (technological protection measures)

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
AUSTRIA	§ 90c (1)	§ 90c (2)	§ 90c (3)	--	Circumvention must result in copyright infringement; Austria chose not to implement Article 6 (4); absence of Article 6(4) makes scope of contractual uncertain.
BELGIUM	Article 79bis	Article 79bis § 1er al 4—5	Article 79bis	Articles 79bis, §2-3 and 87bis: Voluntary measures; judicial enforcement	Circumvention must facilitate infringement; additional standard applied as to intent to circumvent; Measures must be applied within reasonable period of time; limitations are mandatory
CYPRUS	--	Article 14b (criminal sanctions only)	Article 2	Article 14B (3) : obligation to provide means	Significant uncertainties due to lack of prohibition on circumvention ; right holder must supply access tools ; legal nature undefined ; results in self help <i>right</i> for users
CZECHIA	--	Article 43	--	--	Czechia has not implemented Article 6. Article 6 (2) is mirrored in Article 43 which transposes Article 11 WCT and Article 18 WPPT.
DENMARK	Article 75c (1) Article 75 c (2) and (3)	Article 75c (2), 75c (3)	Article 75c (4)	Article 75d; Danish copyright licensing tribunal to “order” right holders	Self help permitted for acts not resulting in copyright infringement (Article 75d); in case right holders do not grant beneficiaries access, a self help right is foreseen following order from tribunal

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
ESTONIA	Article 80(3) [permission to apply TPM's only]	Not implemented in Copyright Act; Article 225 Criminal Code prohibits dealings in removal devices.	Article 80 (3)(2)	Article 80 (3)(4) [foresees obligation to adjust measures to allow free use; measures must be applied within reasonable time; beneficiaries may instigate proceedings before copyright committee]	No explicit prohibition on circumvention (Article 6 (1); general permission to apply TPM's.
FINLAND	Article 50a	Article 50b	Article 50a	Article 50c	Circumvention is explicitly permitted for non-infringing uses in case of lawfully acquired copies.
FRANCE	Article L. 335-3-1 [establishes punishable offence]	Article L-331-5 (Article L-335-4-1(neighbouring rights) ; Article L-342-3-1 (Database Sui generis Right)	Article L-331-5 Measures for protecting against interoperability not covered	Article L-331-6 Authority of Regulation of Technological Measures to resolve disputes; authority has competence to issue binding orders.	Text differs from the directive; complex definition of acts of circumvention; act is only punishable if carried out without circumvention device; circumvention for research purposes is permitted; allows devices manufactured for circumvention which have other purposes (i.e. "significant other purposes" not mentioned).  Article 6(4): authority may determine scope of use according to Article 5(5); private users are covered for purposes of private copying;

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
GERMANY	§ 95a (1)	§ 95a (2)	§ 95a (2) (2)	§ 95b Immediate access to courts if voluntary measures are not applied	Circumvention must result in infringement; excludes TPM's applied for purposes of creating barriers to market entry; Scope of Article 6(2) unclear according to case law; right holders are obliged to take measures; judicial dispute resolution; Article 6(4) does not cover private copying; obligation to mark copy control tools on products; beneficiaries have a general claim to enforce limitations though status of limitations is unclear; uncertainty as regards scope of exclusion of interactive services from Article 6 (4), potentially right to enforce limitations in case of downloaded works.
GREECE	Article 66A (2)	Article 66A (3)	Article 66A (1)	Article 66A (5) Mediation procedure	Article 6 transposed "as is"; Mediator may make recommendations; scope of obligation entirely unclear;
HUNGARY	Article 95 (1)	Article 95 (2)	Article 95 (3)	Article 95/A Mediation proceedings before Board of Experts at Patent Office, subsequent access to judiciary	General prohibition on acts "not authorised"; scope of conditions to be set in mediation unclear; exclude private digital copies

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
IRELAND	Sec. 370	Sec. 140 (Continued application of criminal sanctions, no transposition of Article 6 (2).	Sec. 370	Sec. 374 Immediate access to judiciary	Implemented from WCT/WPPT; acts of circumvention annexed to copyright infringement, no general civil wrong; Article 6(2) not transposed (Sec. 140 (1) and (2) provide for criminal liability; the provisions already existed and goes beyond Article 6 (2) for penalizing possession of devices as such; scope of contractual freedom unclear
ITALY	Article 102 <sup>quater</sup> and Article 174 <sup>ter</sup> (regarding violation of TPM rights)	Article 171 <sup>ter</sup> (f <sup>bis</sup> )	Article 102 <sup>quater</sup>	Article 71 (5) [transposed as annex to limitations]  Mediation procedure before Copyright Committee	Right holders “may” apply technological protection measures; scope of prohibition on circumvention unclear as regards infringement of copyright; act must “unlawfully exploit” copyright; right holder is obliged to provide proper solution for beneficiaries; scope of contractual freedom not clear though Italian law protects all aspects of commercial exploitation
LATVIA	Article 68 (1) (4)	Article 68 (1) (5)	Article 1 (1) (19)	Article 18 (4) provides that user may request removal; if right holder refuses, choice of mediation, arbitration or court proceedings	Existence of limitations need to be taken into account in cases concerning circumvention; merely permits right holders to apply TPM’s; acts of circumvention must result in infringement of copyright; circumvention considered as civil wrong; arguably unlimited scope of contractual freedom

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
LITHUANIA	Article 74 (3)	Article 74 (4)	Article 74 (1)	Article 75 Mediation, subsequent access to courts	No explicit nexus with copyright infringement; violation of TPM's is deemed to constitute civil wrong as such; positive obligation of right holders to make works available to beneficiaries; TPM's must not prevent technological development; right holder must inform government authorities.
LUXEMBOURG	Article 71 quater (1)	Article 71 quater (2)	Article 71ter	No explicit implementation; immediate court proceedings before district court and injunctions available	Computer programs excluded; act of circumvention must result in copyright infringement; beneficiaries have general access to courts based on a positive right to enjoy limitations; specific problem as regards relationship between TPM's and limitations due to absence of levy system
MALTA	Article 42 (1)(c)	Article 42 (1)(d)	Article 2	Article 42 (2)(a) Right holder "should" make means available	Article 6 transposed "as is"; advertisement for circumvention devices (Article 6 (2) EUCD) not covered; scope of contractual freedom unclear as consequence of literal transposition).
NETHERLANDS	Article 29 <sup>a</sup> (2); Article 19 (1) NRA [neighbouring rights]	Article 29 a (3); Article 19 (1) NRA	Article 29 a (1); 19 (1) NRA	Article 29 a (4); 19 (3) NRA  In absence of voluntary measures, no specific procedure is foreseen; to be regulated under future government ordinances	Circumvention constitutes tort; uncertainty as to nexus with copyright infringement; private copies included under voluntary measure obligation

	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
NORWAY	Article 53 a	Article 53 c (no mention of promoting circumvention devices)	--	Article 53 b  In absence of voluntary measures, beneficiaries may demand order by Tribunal established at Ministry of Culture	Cryptography research not prohibited; circumvention prohibited only in relation to acts protected against under copyright; general obligation on right holders to remove TPM's in case of limitations, no scope for contractual restrictions
POLAND	Article 6; Article 79 (1) and 79 (2) in relation to civil sanctions	Article 118 (1) Criminal Code	Article 6 (10) and 6 (11)	No implementation but work is in progress	Acts of circumvention constitute copyright infringement if use is unlawful; general definition pertains to copyright and artistic works only, though civil and criminal sanction seem to apply to all types of subject matter regardless.
PORTUGAL	Article 218	Article 219	Article 217 (2) and 217 (3)	Article 221  Right holder must provide "adequate measures"; mediation and arbitration procedure before the <i>Comissão de Mediação e Arbitragem</i> )	Any act of circumvention is prohibited as such; however, limitations are mandatory and cannot be contractually avoided; the consequence in relation to TPM's and voluntary measures remain unclear.
SLOVAKIA	Not implemented but circumvention prohibited if done for commercial gain under Article 59 (1)	Article 59 (1)	Article 59 (2)	--	The Act merely prohibits acts in the remit of Article 6 (2) EUCD, which prohibits illicit interferences with TPM's applied to protected works.



	ARTICLE 6 (1)	ARTICLE 6 (2)	ARTICLE 6 (3)	ARTICLE 6 (4)	COMMENTS
SLOVENIA	Article 166 a (1) Knowledge not explicitly required	Article 166 a (2)	Article 166 (3)	Articles 166 b and 166 c Obligation to make means available upon request; mediation before body agreed upon by right holders and users associations	Application of TPM's is termed as an exclusive right under copyright law; circumvention prohibited only if exclusive rights are violated; public authorities may circumvent; obligation to mark products.
SPAIN	Article 160 (1)	Article 160 (2); Article 240 Criminal Code (pre-existing) continues to apply	Article 161	Private copying included; immediate access to courts under a positive right to litigate.	Potential reversal of relationship between Article 160 (2) and Article 240 Crim. Code. Limitations under the Database Directive (96/9/EC) are included in Article 161
SWEDEN	Article 52d	Article 52e	No definition provided; refers to "any digital lock"	Article 52f Courts may order removal; penalties for right holders foreseen.	Circumvention must relate to TPM's which prevent or limit copying, i.e. no specific protection against access controls; owner of carriers may (explicitly) circumvent to view or listen to works.
UNITED KINGDOM	Sec. 296ZA	Sec. 296ZB	Sec. 296ZF	Sec. 296ZE Complaints procedure before Secretary of State who may, under his discretion., order right holders to remove TPM's	TPM's must be applied to protected subject matter under CDPA; scope of prohibition not entirely clear though non-infringing uses will not normally be covered under Sec. 296ZA; excludes computer programs and cryptography research; scope of order is relatively open and will depend upon existence of licensing schemes; order can be enforced in court

## F. Table V – Sanctions under Article 6

	Civil Law Sanctions	CRIMINAL SANTIIONS	REMAKS
AUSTRIA	General sanctions under Copyright Law apply	Criminal Sanctions apply for copyright infringement if committed in the course of running a business	
BELGIUM	General sanctions under Copyright apply	Offences are punishable up to € 2500,- as such but fine may be multiplied in case of repeated offences	
CYPRUS	General sanctions under Copyright apply	Offences under Article 6 are punishable up to CY or imprisonment up to three years	
CZECHIA	General sanctions for certain commercial dealings apply	No specific criminal sanctions in Copyright Act	
DENMARK	General civil sanctions apply	Criminal liability for violations of Articles 6 and 7; monetary fine only; requires intent or gross negligence	
ESTONIA	General civil sanctions apply	Criminal sanctions apply under Penal Code for acts violating Article 6 (2)	
FINLAND	General civil sanctions apply	Specific criminal sanctions apply for smaller offences under the Copyright Act and for more serious offences under the Penal Code	
FRANCE	General civil sanctions apply	Specific criminal sanctions have been introduced:  For violations of Article 6 (1) a fixed fine of € 3750,- applies.  For violations of Article 6 (2); six months imprisonment or up to € 30000	France has introduced specific criminal sanctions for illegal file shoring

	Civil Law Sanctions	CRIMINAL SANTIIONS	REMAKS
GERMANY	General civil sanctions apply	General criminal sanctions apply in case the violation was committed in association with a business	
GREECE	General civil sanctions apply	Violations of Articles 6 (1) and (2) are punishable criminal offences: imprisonment of at least one year and a fine between € 2900,- and 15.000,-.	
HUNGARY	General Civil sanctions apply	Specific additional criminal sanctions apply for qualified acts under Penal Code	
IRELAND	General civil sanctions apply	Criminal sanctions apply for violations as infringement of copyright; in addition, criminal sanction are specified for certain acts falling under Article 6 (2), though these were not adjusted.	
ITALY	General civil sanctions apply	Specific fixed fines (€ 154,- per offence) apply with regard to Article 6 (1); additional criminal sanction under general copyright apply likewise	
LATVIA	General civil sanction apply	General criminal sanctions apply under copyright law.	
LITHUANIA	General civil sanctions apply	Administrative and criminal liability for violations of copyright, related rights and sui generis rights apply under the Code of Administration Offences and the Criminal Code	
LUXEMBOURG	General civil sanction apply under the Civil Code	Criminal sanction apply for all acts not done for private purposes.	
MALTA	General civil sanctions apply	Criminal sanction apply in general for acts committed for personal gain or in connection with a trade.	

	Civil Law Sanctions	CRIMINAL SANTIIONS	REMAKS
NETHERLANDS	General civil sanctions apply	--	
NORWAY	General civil sanctions apply	Specific criminal sanction apply for violations of Article 6: imprisonment up to three years for deliberate or negligent offences; attempted offences are penalised	
POLAND	General civil sanctions apply	Specific criminal prohibition on dealings in circumvention devices	
PORTUGAL	General civil sanctions apply	<p>The act of circumvention carries a penalty of imprisonment for a term of up to one year or a fine of up to 100 days. Attempts are punishable with a fine of up to 25 days. Criminal proceedings can be initiated even in the absence of a complaint.</p> <p>For violations of Article 6 (2), imprisonment of up to six months imprisonment or a fine of up to 50 days is foreseen.</p>	
SLOVAKIA	Specific claims for estoppel have been introduced, otherwise general civil sanction apply	General criminal sanctions fro copyright infringement apply	
SLOVENIA	General civil sanction	Criminal sanction following general copyright law apply for commercial acts.	
SPAIN	General civil sanctions apply	Specific criminal offence for acts falling within Article 6 (2) under a pre-existing provision of the Penal Code	
SWEDEN	General civil sanctions apply	Fines or imprisonment of up to six months for wilful or grossly negligent violations	

	Civil Law Sanctions	CRIMINAL SANTIIONS	REMAKS
UNITED KINGDOM	General civil sanctions apply	General criminal sanctions apply under copyright law; the fine imposed depends on whether the act was done intentionally and/or with the intention to make profit.	

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### III AUSTRIA

Austria implemented the Directive in 2003, and the provisions entered into force following amendment to the Copyright Act (UrhG) (*Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte*, StF: BGBl. Nr. 111/1936 i.d.F. der UrhG-Novelle 2003) on 1 July 2003 (Bundesgesetzblatt 2003 I 32). Previous drafts had been submitted by the Federal Ministry of Justice in November 2001<sup>171</sup>, later amended with a more ambitious project envisaging a reform of copyright law including contract law. A second draft bill was submitted in July 2002 concerning mainly copyright contract law. In the end, only the mandatory parts of the Directive were introduced into Austrian law. The amendments concern the adoption of existing limitations to Articles 5 (2) and 5 (3) EUCD which led to a number of changes. In addition, Articles 6 and 7 EUCD were transposed.

#### A. Exclusive Rights

The exclusive rights have fully been implemented and granted to authors and holders of neighbouring rights.

##### I. *Reproduction Right*

The reproduction right is granted under § 14 (1) UrhG. The text was amended so as to implement the specific elements under Article 2 EUCD particularly with respect to including temporary copies.

##### II. *Communication to the Public*

Article 3 EUCD was implemented in a new § 18a, which systematically places the communication to the public right into context with the pre-existing public performance and broadcasting rights. Technically, § 18a provides for both a communication to the public right and a making available right. However, the provision does expressly exclude a separate communication to the public right. The right is thereby restricted to acts of making available. It follows that an act of downloading would only be classified as (and if) a reproduction ensues. Given that the Austrian implementation does not clarify whether the source copy must be legal in the context of the respective private copying defence, it is possible – at least under the statutory text – that persons downloading illegally uploaded works may rely upon the private use defence.

In relation to the previous approach, the new § 18b may thus refine the scope of application of the reproduction and distribution in electronic networks. The Austrian approach was (in contrast to the German approach) to perceive acts of making available as both copying and non-physical distribution, as was indicated in a number of decisions

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<sup>171</sup> Materials (in German) are available under [http://www.parlament.gv.at/portal/page?\\_pageid=908,414912&\\_dad=portal&\\_schema=PORTAL](http://www.parlament.gv.at/portal/page?_pageid=908,414912&_dad=portal&_schema=PORTAL)



by the Supreme Court (OGH)<sup>172</sup>.

The right is granted to owners of neighbouring rights under § 71a. Whereas the right was granted to authors under one of the existing economic rights, the extension to owners of neighbouring clearly extended the scope of rights granted. The Austrian Act protects, in addition to those rights mentioned under Article 3 (2) EUCD, non-original photographs and organizers of events. Although the precise categorisation of electronic transmissions of works was debated, Austria had thus always taken the view that the exploitation of works in such manner constitutes an infringing act.

### **III. Distribution Right**

The distribution right (§ 17) was amended so as to fully comply with Article 4 (2) EUCD. The act now makes it clear that exhaustion requires the transfer of property in the copy.

## **B. Exceptions and Limitations**

The Austrian Act, similar to the German Act, provides broad private copying exceptions and more specific limitations. The status of limitations appears more user friendly in that the Act defines limitations as permitting the free use of works (rather than merely constituting a limitation). However, certain restriction have been made in line with the Directive, in particular as commercial uses are concerned and to adapt existing provisions to the introduction of the communication to the public right. In principle, the system of limitations was left unaffected.

The terminology in relation to “commercial purposes” will present a potential interpretation problem. Austrian law, in comparable cases, was based on whether a certain activity was done in order gain profit.

The three step test has not been implemented. The leading Austrian commentary has described the three test as a mandatory rule for interpretation rather than a mere obligation on legislators and the view has been expressed that insofar as the test is expressly mentioned (i.e. under Article 5 (1) EUCD) it must be incorporated but this was not followed<sup>173</sup>.

All exceptions relating to own uses are subject to certain restrictions. The Act does not permit to make reproductions in cases of entire books or journals and musical scores, though the retyping copy and the reproduction of out of print books and books which have not been published is permitted.

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<sup>172</sup> Cf. “*APA-Bildfunknetz*”, 4.7.1994, [1995] Medien & Recht 143 ff.; “*Internet news Agency I*”, [2001] ÖBL 220; „*C-Villas*“ [2002] GRUR 452) though a recent decision left the issue open (cf. OGH 17.12.2002 – “*Meteodata*” [2003] Medien & Recht 35.

<sup>173</sup> cf. M Walter, Urheberrecht – Die UrhG-Novelle 2003 (Vienna: 2003), p. 53.

Austrian law, contrary to German law, also occasionally applies constitutional guarantees to override copyright protection and thereby creates unwritten limitations. The respective judicature concerns, however, rather specific instances<sup>174</sup>

### **I. *Transient Copies***

Article 5 (1) EUCD was introduced in a new § 41a. The clause mirrors Article 5 (1) EUCD and applies to all works including computer programs and databases<sup>175</sup>.

The Austrian Supreme Courts, in its “Metedata” decision, took the view that a transient reproduction occurring as part of an online transmission would be exempt both under existing law (as private reproduction for professional purposes) and as a transient copy as such. The case, concerning the tolerability of hyperlinks, was exclusively decided on the basis of the reproduction right. It did not discuss liability for making available. The case was decided before implementation.

### **II. *Reprography***

Reprography, following Article 5 (2) (a), constitutes an element of the wider private copying exception (§§ 42, 42a). Reprographic copying means copying on paper or similar media, such as microfilm, microfiche or textiles.

§ 42 (1) permits the making of a copy on paper or similar medium by anyone for his own use. The meaning of “similar medium” is not further elucidated. Reprographic copies may also be made by third parties on request for the purpose of own uses. In case reprographic or similar means are used, the reproduction may be made for payment. The meaning of “anyone” includes natural persons as well as legal entities. “Own” uses allow all uses which fall within the broader meaning of personal uses and uses in the course of a business or for uses in institutions. This excludes notations of musical scores.

In addition, § 42 (3) falls within the remit of Article 5 (2) (a) EUCD and permits the making of copies of news Articles in relation to daily news for one’s own use. Such use must be in analogue form.

### **III. *Private Copying***

§ 42 covers any other reproductions and includes digital copying, though this is now subject to certain restrictions. §§ 42 (2) and (3) deal with reproductions for purposes of research and news reporting respectively and fall under Articles 5 (3) (a) and 5 (3) (c) EUCD<sup>176</sup>.

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<sup>174</sup> See OGH, 24 June 2003 [2003] Medien & Recht 317 – Photograph of Murder Victim.

<sup>175</sup> The chapter on ‘free uses’ generally encompasses all categories of works, see Dillenz, Urheberrechtsgesetz und Verwertungsgesellschaftengesetz, vor §§ 41 ff., at no. 5.

<sup>176</sup> See below, IIIB.V, p. 112, and IIIB.VII, p. 112.

§ 42 (4) affords to users the central right to make singular copies of a work. The provision is in line with Article 5 (2) (b) and permits *natural* persons to make such copies for any purpose and on any carrier for *private* use, which must be neither for direct nor indirect commercial purpose. Private use means personal use in connection with private (i.e. domestic purposes) which excludes legal entities, which is taken to also allow the transfer to family members and close friends.

The most problematic feature of § 42 (4) is the unresolved issue of whether it applies to file sharing situations. The Act is firm in that a copy made for own and private uses is not permitted if made in order to make the work publicly available, and therefore a private copy used for allowing the download from a computer directory renders the copy unlawful. In contrast to Germany, Austria has not clarified the situation as regards the permissibility of downloads from such directory. Two views persist. The first view is based on existing judicature which had already inferred that – although § 42 does not make the lawfulness of the copy to be reproduced a condition – a copy made from an illegitimate or infringing source copy cannot fall within the private copying exception<sup>177</sup>. Since this was decided in relation to an unlawful acquisition of the source copy, it is doubted whether the same restriction applies to file sharing scenarios.

Although an illicit acquisition of a work in physical form – in the decision mentioned, a work of art – is not comparable to the situation that the reproduction of a work for purposes of making it available in file sharing networks, it seems likely that Austrian law will be very reluctant to permit downloads for purposes of private copying. Since private copying is subject to levies, this would mean that authors can claim compensation for eligible copying devices, i.e. hard disks on personal computers. This is currently not the case.

Private digital copies may not be made by third parties with further restrictions than in cases of reprographic reproductions. The “agency” argument which prevailed in Germany does not apply.

In addition, Article 5 (2) (b) is reflected in § 76a which generally and without restriction to non-commercial uses permits the recording of broadcasts without mentioning the narrower time shifting requirement.

#### IV. *Libraries, museums and archives*

§ 42 (7) UrhG permits publicly accessible establishments collecting copies of works to make reprographic copies. Digital copies may be made only without commercial purposes, and only if the source copy is in the possession of the collection (and may be exhibited and lend). The provision goes beyond Article 5 (2) (c) EUCD in referring to publicly accessible establishments though the purpose denoted that it is restricted to the establishments covered in Article 5 (2) (c) EUCD.

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<sup>177</sup> Supreme Court Decision, OGH 17 March 1998, [1998] Medien & Recht 201 – “Figur auf einem Bein”.

## **V. *Teaching and Scientific Research***

The teaching and research exception under Article 5 (3) (a) is mirrored in § 42 (2), according to which anyone may make singular copies of a work for individual (“own”) research purposes. This is in addition to § 42 (1) (reprographic copies) and applies with respect to all types of reproduction processes including digital copies. The purpose must be non-commercial, a restriction implemented in 2003, and the reproduction must be justified by the actual research purpose endeavoured.

§ 42 (6) permits schools and universities to make reproductions of works for purposes of teaching or instruction in an amount required for a school class or lecture. The Austrian Act exempts school textbooks from this. § 45 allows the inclusion of certain published works in collections intended for churches, schools and teaching. This does not apply with respect to copying works for school textbooks. The purpose must be non-commercial. A fair compensation is payable.

## **VI. *Disabled People***

§ 42d transposes Article 5 (3) (b) EUCD, the only provision which has been newly introduced. It permits the non-commercial use of a published work by way of reproduction and (physical) distribution to disabled persons in a format suitable for them and subject to the work not already being commercially supplied in such format. The use must be non-commercial. § 44d is restricted to uses which are necessary because of the specific disability. The author receives a fair remuneration.

## **VII. *News Reporting***

The general position on news reporting and copyright protection in Austria appears much more biased towards press freedom than is the case in a number of other member states. The ministerial draft sought to implement a general and wide ranging limitation permitting media observation to anyone. This was based upon decisions by the Supreme Court which recognized that Article 10 (1) ECHR conflicts with copyright and which, therefore, subjects copyright owners to a balancing assessment between the two fundamental paradigms. This was not pursued and now the limitations falling in the remit of Article 5 (3) (c) EUCD have been aligned so as to comply with the Directive.

§ 42c permits the reproduction, distribution, radio broadcast, making available and use in relation to public lectures and performances of news reports of current (daily) events which are publicly perceptible. This relates to „own“ (i.e. going beyond personal) uses only and falls under both Article 5 (2) (b) and 5 (3) (c) EUCD. As this relates to individual uses, the source acknowledgement requirement does not apply.

§ 44 (1) contains, as *lex specialis*, a specific clause related to the press. It provides that single articles published in a journal or newspaper on current (daily) economic, political or religious issues may be reproduced in other journals or newspapers, unless the right owner has reserved his rights. This does not apply to simple news, which are not

protected by copyright. In relation to such time sensitive items, § 79 stipulates a grace period of 12 hours.

### **VIII.** *Quotations*

§ 46 permits quotations of individual passages of literary or musical works to an extent justified by the purpose of quoting. The clause was not changed.

### **IX.** *Public Security*

The Austrian state generously exempts itself, in the provision opening the chapter on free uses, from copyright infringement by permitting any use of a work for any purpose of public security, for the smooth operation of public administration and judicial proceedings, § 41.

### **X.** *Speeches, Public Lectures etc.*

Speeches delivered in a public assembly, during court proceedings or before public authorities and public political addresses may be reproduced, distributed, broadcast and made available to the public for purposes of news reporting. In case such speeches have been recorded, the distribution of such recording requires consent.

### **XI.** *Architectural Works etc.*

§ 54 (5) permits the reproduction, distribution and public communication of works of architecture and other works of fine art (including paintings) permanently located in public places. The limitation existed previously.

### **XII.** *Advertising for Public Exhibitions etc.*

§ 54 (1) allows the copying, distribution and making available of artistic works in a public collection for editing inventories in so far as is necessary for purposes of attracting visitors. Any other commercial use is not permitted. Published works of fine art may, for the purpose of auction or other public sale, also be reproduced etc. in catalogues and like publications in order to promote their sale. Such catalogues must not be sold for a charge above its manufacture costs.

### **XIII.** *Caricature and Parody*

No such limitation exists. Freedom to make caricatures etc. is safeguarded under general principles of copyright law and will seldom amount to a reproduction or adaptation.

### **XIV.** *Demonstration and Repair*

§ 56 (1) allows the use of works on audio or video recordings etc. for purposes of demonstration in businesses to customers or to test the usability of devices.

## **C. Compensation System**

The Austrian copyright system is based on a levy scheme. Levies apply with regard to private reprographic copying, and for private copying on audio and audiovisual carriers. Levies are, most importantly, imposed on devices and carriers which permit, due to their nature, allow the expectation that they will be used for private copying purposes private copying. The levy scheme, in addition to the compensation requirements already discussed in relation to specific uses, is additionally applied to blank tapes for works broadcast, made available or fixated on an audio or audiovisual carrier for commercial purposes (§§ 42 (4) – 42 (6)). The extension to works made available in that sense was introduced following the ministerial draft. In this case, if it is to be expected that the work will be subjected to acts of private or other copying for individual copying, the author may claim fair compensation (blank tape levy).

A levy is also imposed upon in cases for reprographic compensation. This is levied upon copying devices has been put on the Austrian market, and which is designed so as to permit copying. The same applies with respect to the use of copying device in schools, universities, establishment for professional development, public libraries and other establishments providing copying devices (i.e. copy shops) where the making of copies is charged for.

Liability for payment rests, in the case of blank carriers and copying devices, with the person first putting the item into circulation. Importers, wholesalers and retailers who offer such items on the market are liable as guarantors. Certain persons are exempt from this in cases of minor economic significance (such as retailers ordering blank tapes with a total capacity of up to 1000 hours only per year).

The blank tape levy is covered by collective agreements between collecting societies and users' organizations. Blank carriers cover analogue tapes as well as Audio-CD's, DAT, rewritable CD's, minidisks etc. Computer hard drives fall within the meaning of blank tape under § 42b<sup>178</sup> but no levy scheme has been put in place.

Users are liable in certain specific cases such as public lending, textbooks for teaching purposes or making available and public communication of audio-visual works in schools and universities.

The application of technological protection measures has not been expressly recognized in relation to levies.

## **D. Protection of Technological Measures**

Austria implemented Article 6 EUCD in a single § 90c. The provision contains a rather faithful implementation of Articles 6 (1) – (3) EUCD though Austria did not implement Article 6 (4) EUCD. The position was to await the formulation of individual licensing

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<sup>178</sup> Landesgericht Linz, 22.6.2004., 5 CG 204/03z.

schemes between right holder and beneficiaries and thus not to interfere. The Austrian transposition leaves a number of open issues. The provision does not apply to computer programs.

As with Germany, the prohibition on circumventing technological protection measures has been inserted in the passage dealing with consequences of infringement. The prohibition in § 90c is formulated as an additional claim rather than a certain use right, which clarifies that a claim for compensation cannot arise. The provision is formulated in close analogy to the definitions in Article 6 (1) and (2) EUCD but is structured in the fashion of a civil offence.

## **I.   *Acts of Circumvention***

§ 90c (1) embraces the concept of prohibition on circumvention of technological protection measures. According to § 90c (1) (1), the owner of any exclusive right under the Authors Rights Act who applies effective technological measures in order to prevent or restrict a violation of that right may bring a claim for estoppel and elimination of such acts insofar as the act of circumvention conflicts with the law. It is a condition that the person circumventing measures knows or has, under the circumstances, reasonable grounds to know, that he or she is pursuing that objective.

The provision is based upon the notion of copyright violation in that acts of circumvention whereas Article 6 (1) arguably sanctions acts of circumvention as such. This does not immediately follow from § 90c (1) but from the definition of technological protection measures. Effective technological protection measures are defined in § 90c (2). Technological protection measures encompass all technologies, devices and parts thereof which, in the normal course of their operation, are designed to *prevent or restrict* the violation of rights as defined in § 90c (1) and which are, additionally, factually fulfilling *that* purpose. Technologies etc. must fulfil, in order to fall within the ambit of § 90c (2), certain preconditions which designate, concurrently, the scope of infringing acts. This pertains to the ability to control the use of works and other subject matter against copyright infringement. Measures must therefore be employed to either control access to the work (§ 90c (2) (1), include a protection measures such as encryption or other means of transformation or a mechanism to control copying.

§ 90c (1) (1) thereby – arguably - refers to acts which control both access and copy protection mechanisms, but limits – via the definition of technological protection measures – the acts which amount to an infringement to those violating copyright, a position which is supported by the fact that civil and criminal sanctions for acts of circumventions have been formulated so as to alienate with those foreseen for copyright infringement.

This causes certain problems. First, Austrian law allows self help in all cases which do not result in acts restricted by copyright, and in that sense the circumvention of protection measures is permissible in the case of, for instance, DVD's to be viewed. It also permits the circumvention in order to repair, for example, an Audio-CD if done for

the purpose of listening. The second problem is more subtle and relates to the interface between limitations and circumvention. Under the wording of § 90b, the measure must enable the control against acts restricted by copyright law, not restricted by the right holder outside the scope of copyright. Under Austrian law, limitations are deemed to be free uses. This raises the question whether circumvention is, as such, permissible if then person circumventing can rely on a limitation. The reason why that issues arises is the absence of an implementation of Article 6 (4) EUCD, which in the legislative framework of those members states which implemented it serves the important purpose to technically separate and juxtapose acts which do not infringe copyright (listening, reading, viewing) from acts which, by their definition, do so, but are restricted by limitations. The danger under the solution to leave out any indication which permits a distinction between free acts and acts covered by a free use provision lies in permitting (even if it were to simply indicate a statutory program or preference for voluntary schemes) circumvention so as to freely exercise limitations, and in that sense Austrian law allows a general self help right.

Conversely, the ministerial draft points out that in relation to those limitations which fall under Article 6 (4) EUCD only three are relevant to the Austrian Act, namely Article 5 (2) (a), 5 (2)(b) and 5 (2)(c) EUCD, for which it is hoped that voluntary measures will emerge. The ministerial draft is, however, silent on the consequences of circumventing in the absence of such measures. Given that there is no unambiguous indication as to the requirement of legitimacy of the source copy under § 42 (4), the interplay between § 42 (4) and § 90c at least allows the inference that a user may circumvent technological protection measures applied to a musical work stored for purposes of file sharing, though the person making it available in such way may not.

In addition, the situation with regard to interactive services is not covered. Since such services are exempt from the balancing clause under Article 6 (4) EUCD, the situation as regards such contracts falling within Article 6 (4) (4) EUCD remains unresolved. If no agreement is concluded, the prevalence of such agreement over limitations is ambiguous. Whereas the circumvention of access control mechanisms in order to illicitly gain access to an online service will arguably be covered under § 90c (1) for making a temporary reproduction not covered under § 41a (Article 5 (1) EUCD), the subsequent use of works included may fall by the wayside in that here a limitation might apply or that use is not restricted by copyright. If an agreement is concluded, the fact that Austrian law does not exempt it from Article 6 (4) EUCD means that the supremacy of such agreement may be contested both as such and in relation to certain uses of works downloaded under such agreement. The effect then is to force courts into assessing the fundamental relationship between technological protection measures and limitations outside the scope of the Directive, and it may be anticipated that such assessment will ask whether limitations function as statutory models within the meaning of consumer protection law and the prohibition on unfair terms and conditions in consumer contracts. Likewise, as noted, the Austrian Supreme Court has readily adopted approaches which immediately seek to balance copyright with information freedom rights under Article 10 (1) ECHR. A



similar proposition has been raised in relation to the German transposition but there it only follows from a restrictive interpretation of Article 6 (4) (4) as implemented<sup>179</sup> and not from legislative uncertainty on the status of Article 6 (4) (4) EUCD as a re-exception which reserves contractual freedom in such cases. The problem will not be rectifiable by reiterating an obligation to construe the law in accordance with the Directive since Article 6 (4) EUCD is not compulsory.

## **II. *Commercial Dealings***

§ 90 c (2) implements Article 6 (2) EUCD and prohibits the manufacture, import, distribution, sale or rental for commercial purposes, advertisement for the sale or rental and provision of services which enable circumvention of effective technological protection measures as defined under § 90c (3) (see above) and which have no other significant commercial than to circumvent, only a restricted commercial purpose or use, or which have been designed, manufacture, adapted or provided to facilitate or enable circumvention. This is clearly in line with Article 6 (2) EUCD. The provision also makes it clear that circumvention, in the same vein as under § 90c (1), pertains to measures protecting against restricted acts.

## **E. Rights Management Information**

Article 7 has been transposed, without significant public debate, in § 90d. The provision asserts the owner of an exclusive right protected under the Act may bring an action for any removal or alteration of rights management information. The same applies if copies of works are distributed or imported for distribution, or used for broadcast, public performance or public making available. The claim only arises if the person committing the act knows or should, under the circumstances, have known, that in doing so they induce, enable, facilitate or conceal infringement of rights protected under the Act. The information must have been applied to a copy or other subject matter and must identify the work, its owner or the licensee, or modalities and conditions of use. The same sanctions as for copyright infringement apply. .

## **F. Sanctions**

As noted, the act does not distinguish between sanction imposed on copyright infringement and those imposed on a violation of technological protection measures and rights management information.

The implementation, in addition, introduced a right of information against potential infringers (§ 87a (1)) and also implemented Article 8 (3) EUCD in § 81 (1a).

## **G. Conclusion**

The Austrian Act complies with the Directive. As to the communication to the public right, it is noted that only the making available right has been transposed, whilst

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<sup>179</sup> See the report on Germany, XID.III.1), p. 238 et seq.

communication to the public refers to traditional forms of public and thereby simultaneous modes of reception.

The limitations are in general in line although a clarification in relation to the legality of the source copy would be advisable.

The implementation of Article 6 EUCD in § 90 c is problematic, though it complies with the legislative freedom provided for. As mentioned, the absence of any indication as to voluntary licensing schemes and their subsequent status in law, coupled with a prohibition on circumventing technological protection measures which result in infringement, creates a significant degree of legal uncertainty as to the status of limitations. This denotes that, in general, Article 6 (4) should be transposed so as to clarify the relationship between beneficiaries and technological protection measures in general, and to provide a clear rule and exception relationship.

## IV BELGIUM

The Directive has been implemented following legislative instrument *Loi du 22 mai 2005 transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information* (published in the *Moniteur Belge* (*Official Journal*), 27/05/2005, p. 24997).

The law of May 22, 2005 modified the Belgian Copyright Law of June 30, 1994, including the new provisions following from the EUCD. The new provisions entered into force on the 1<sup>st</sup> of June 2005, save for the provisions the entry into force of which depends on the adoption of a regulatory measure (*arête-royal*). These comprise a new definition of the private copying exception and its levy system, and a new definition of the reprography exception and its levy system.

The law of May 22d, 2005, has also modified the law of August 31<sup>st</sup>, 1998 and the law of August 11<sup>th</sup>, 1998, relating to the protection of databases under the *sui generis* right (the copyright protection of database is contained in the general copyright law of 1994).

According to the Recital 50 EUCD, the Belgian Law of June 30<sup>th</sup>, 1994 (same date as the general Copyright Act) in relation to software protection was not modified in the process of transposition. Consequently, the new protection of technological measures does not apply to software.

There has not been any national consultation process or impact assessment. Since Belgium had considerable delay in the transposition of the directive, urgency had been declared and the discussions in Parliament were rapid (less than one year between the introduction of the Bill and its adoption). As a consequence, not many stakeholders or experts have been heard by the Parliament. There has not been any public debate.

It is worth noting that, prior to the Bill that has finally transposed the directive into Belgian law, there had been other proposals or bills originating in Members of Parliament as early as April 2001 (before the formal adoption of the directive) that were discussed, but eventually replaced by the Bill drafted by the government.

### A. Exclusive rights

#### I. *Reproduction Right*

Prior to the transposition, the reproduction right used to cover any act of reproduction by any means and in any form, which was already a very broad definition. The definition "...whether direct or indirect, temporary or permanent, in whole or in part" has now been added.

The beneficiaries of the right of reproduction are authors of literary and artistic works protected by copyright (Article 1, al. 1 Copyright Act), performers in his/her performance (Article 35, §1 Copyright Act), producers of phonograms and of first

fixation of films (Article 39 Copyright Act), broadcasters in his/her broadcast (Article 44, b) Copyright Act). For all these right holders, the definition of the reproduction right has been taken in extenso from the directive.

There has been no case law that has explicitly stated that the reproduction right includes temporary and ephemeral copies. However, the prior definition of the reproduction right said that the right covers any act of reproduction, by any manner and in any form, which could be deemed to cover acts of temporary reproduction. As to software and databases, the definition of the right of reproduction already included temporary copies, in conformity with the software and database directives.

## II. *Communication to the Public*

The previous definition of the right of public communication was broadly defined so as to include any act of communication made by any process. The case law applied the right of public communication to the act of making available online newspaper articles stored in a database. Articles were sent to users upon demand<sup>180</sup>. Therefore, one can consider that the communication right already covered non-simultaneous reception of electronic communication or acts of making copyrighted content available to the members of the public at a place and at a time individually chosen by them.

## III. *Distribution Right*

The situation of the distribution right was complex under Belgian Law. Due to the transposition of prior European directives, the distribution right and its exhaustion were expressly provided for computer programs (Article. 5c Software Copyright Act), performer's rights, phonogram and film producers and broadcasters.

As far as copyright was concerned, neither the right of distribution nor the principle of its exhaustion were provided explicitly in the copyright law. However, this right was recognised under case law, first as a component of the *droit de destination* (right to control the use made of tangible copies of the work), thus included in the reproduction right, and eventually, as an autonomous right<sup>181</sup>.

The explicit mention of the right of distribution in the exclusive right granted by copyright was however desirable and has been introduced in Article 1 of the copyright act by the transposition law. For copyright and neighbouring rights, the distribution right is said to be exhausted by "the first sale or other transfer of ownership of the original or of a copy of a work, in the European Community of that object by the right holder or with his consent. It does not extend to non-physical transactions, as it was made clear

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<sup>180</sup> *Central Station* case, Civ. Bruxelles (cess.), 16 octobre 1996, *Auteurs et Média*, 1996, p. 426, confirmé par Bruxelles, 28 octobre 1997, *Auteurs & Média*, 1997, p. 383.

<sup>181</sup> Bruxelles, 28 janvier 1997, *I.R.D.I.*, 1997, p. 99 *confirmé par* Cass., 12 juin 1998, *Ing.-Cons.*, 1999, p. 100; Bruxelles, 11 avril 1997, *Auteurs & Média*, 1997, p. 265; Liège, 8 décembre 1998, *Auteurs et Média*, 1999, p. 67). The principle of European exhaustion has also been recognised by case law (Bruxelles, 22 mai 1996, *Auteurs & Média*, 1997, p. 178; Liège, 8 décembre 1998, *Auteurs et Média*, 1999, p. 67).

during the legislative process. The explanatory memorandum refers to Recital 29 EUCD and asserts that exhaustion does not apply to online services. It also adds that it does not apply to the tangible copy of a work made by a user of such a service with the consent of the right owner. There are also no provisions in the law that explicitly deal with restrictive licenses. There is no case law either.

## **B. Exceptions and Limitations**

For all exceptions except for temporary copy, the law requires that the work has to have been lawfully published, which should be read as "lawfully divulged" or "divulged with the consent of the author", and refers to the moral right of divulgation.

Articles 23bis (exceptions to copyright) and 46bis (exceptions to related rights), added to the law in 1998, state that all exceptions are of a mandatory nature and cannot be contracted out.

These provisions have been modified during the transposition process to add a new provision. It states that "It can be derogated from the provision laid down in the last paragraph (mandatory nature of the exceptions), when it concerns works that are made available to the public upon demand, on agreed contractual terms, in such a way that members of the public may access them from a place and at a time individually chosen by them"

The lawmaker has decided not to implement expressly the three step test, i.e., not to include it in a specific provision of the Copyright Act. The reason that was given for that omission was that the three-step-test was aimed to serve as a guide for the legislator when enacting new exceptions to copyright or adapting old ones. Therefore, as the three-step test is mandatory for the lawmaker, once the exceptions are granted by the copyright law, they are deemed to be compliant with the test. And there is no need to state that the existing exceptions have yet to comply with the test. However, the preparatory documents recall that the three-step test is included in the Berne Convention and in the TRIPS-Agreement, which means that it is an international obligation that is mandatory for the Belgian legislator<sup>182</sup>.

Some exceptions also include criteria of the three step test in their conditions such as the need not to conflict with the normal exploitation of the work or not to prejudice the interests of the right holders.

The Explanatory Memorandum to the Transposition Bill also states that the three-step test is primarily directed to the legislator and not to the courts, which can however refer to the test, as a guideline, when applying the law. In our view, it means that the test can be used by the judges to construe the scope of application of an exception where the legal text is not clear or when the context of application of an exception has changed.

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<sup>182</sup> Explanatory memorandum of the bill, *Doc. Parl.*, Ch. Repr., sess. 2003-2004, n°1137/1, comment of Article 4.

## **I.***Transient Copies*

The exemption for temporary act of reproduction has been implemented in Article 21 of the Copyright Act, thus as a copyright limitation. The text of the exception has been taken from the directive. It states that: “The author cannot prohibit temporary acts of reproduction, which are transient or incidental and are an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a protected work, and which have no independent economic significance”. A similar exception is provided in Article 46, 4°bis, for neighbouring rights.

## **II.***Reprography*

A limitation existed before but was limited to reproductions of works fixed on paper or a similar support. The criterion was thus the medium of the work to be copied, not the medium of the copy made. That provision has been changed and the criteria of the medium of the copy, traditionally applicable for cases of reprography, has been adopted. Article 22, §1er, 4° of the Copyright now allows for "reproductions in part or in whole of Articles and works of plastic arts and reproductions of short fragments of other works, with the exception of music sheets, when this reproduction is made on paper or any similar medium and by any photographic technique or a method leading to a similar result, in a strictly private purpose and to the extent it does not prejudice the normal exploitation of the work".

The change to the criterion of the mode of reproduction entails for example that a scanned copy of a book is not considered anymore to be covered by this exception, but is now included in the private copy of the Article 22, 5°. There has been so far no interpretation and/or doctrinal problem.

The reprography exception is compensated by a levy that is imposed upon the manufacture, importation, and intra-EU acquisition of reprography devices. Any person who makes such copies is also liable to pay a proportional remuneration. The levy scheme was modified following the transposition as follows: A regulatory measure (arrêté-royal) has to determine those devices manifestly ("*manifestement*") used for reprography. The choice of criteria to determine applicable devices to which the levy should apply has been very controversial. In addition, a commission of Consultation of Stakeholders is created with the aim of reporting on the phenomenon of reprography, advising the government on the devices used for reprography, etc.

This new system of levy for reprography, as well as the provision of Article 22, §1er, 4° itself, will enter into force when the needed regulatory measures will be enacted. This exception also applies to non-electronic databases (Article 22bis, §1er, 1°).

### III. *Private Copying*

A private copying exception existed in Belgian law, but it was largely modified during the transposition process.

Previously, Article 22, §1er Copyright Act distinguished two cases of copying for private purposes. Article 22, §1er, 4° allowed for the reproduction of articles and graphic works and of short fragments of other types of works fixed on a graphic or similar support, upon the condition that such copy is made for a strictly private purpose and does not harm the normal exploitation of the work. This exception was dissimilar to what we call reprography, since the criterion was not that of the photographic or similar technique of reproduction, but the fact that the work from which the copy is made is on paper or a similar medium. This was taken from the Database Directive that disallows the private copy of electronic databases only, but permits the making of copies from non-electronic databases. At the time of transposition of that directive, the legislator has considered that if the electronic database could not be copied for private purpose, neither non-paper elements thereof should be.

This was compensated by a levy that was paid by the manufacturer, the importer or the intra-community acquirer of devices enabling such a copy. Besides, remuneration is paid by any natural or legal person who makes such copies, in proportion to the copies made. An *arrêté-royal* determined the ways this levy was collected and entrusted a collecting society to collect the remuneration (Reprobel), and to distribute it eventually to right holders. The remuneration was divided and attributed to both publishers and authors in equal shares.

In addition, Article 22, §1er, 5°, allowed the reproduction of sound and audiovisual works made within and used in the family circle. Private copying was thus limited to sound and audiovisual works. This exception was compensated by a system of levy collected both on devices enabling the private copy and on the blank tapes, CDs or DVDs. The persons liable to pay such remuneration were manufacturers, importers, or intra-EU acquirers of such devices or blank tapes. The law protects the authors and performers by stating that they enjoy a right to an equitable remuneration for private copy that cannot be waived.

The transposition law changed that system in the following way. Article 22, §1er, 4° has been modified to clearly and solely cover reprography, as set out below. Article 22, §1er, 5° now covers any copying, and allows the making of reproductions on any carrier other than paper or similar. The conditions of the private copying provision remain unchanged: the copy should be made within the family circle and its use is limited to the family circle. The levy system has also been modified..

### IV. *Libraries, museums and archives*

One specific exception existed but was very limited since it applied only to the Museum of Cinema or Cinémathèque Royale and allowed it to transmit, copy and restore films

for preservation of the cinematographic patrimony. It was emphasised that the Museum of Cinema could not use the copies made under that exception for a commercial or lucrative purpose.

This exception has been extended by the 2005 Law to all museums, archives and libraries. Article 22, §1er, 8° now allows "...the reproduction limited to a certain number of copies determined according to and justified by the purpose of the preservation of the cultural and scientific patrimony, made by publicly accessible libraries, by museums, or by archives, which do not pursue any direct or indirect economic or commercial advantage, to the extent it does not conflict with the normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author".

Educational establishments are not mentioned in this exception, contrary to what the directive provided. The lawmaker considered that such establishments were protected enough by the exceptions for illustration of teaching. Of course, libraries of educational establishments will benefit from the exception as well.

The exception also states that the copies made will be the property of the libraries, museums or archives but could not be used for a commercial or economic purpose. The right holder will be entitled to get access to such copies, against a due remuneration of the work accomplished by such institutions. A similar exception is provided in Article 46, 7°, for neighbouring rights.

#### **V. *Broadcasters***

Such exception did not exist before. Article 22, §1er, 10° now provides for an exception for ephemeral recordings of works made by broadcasting organisations for their own broadcasts and by means of their own facilities, including by means of persons who act on their behalf and under their liability. This provision does not mention the preservation of these recordings in official archives but it could be covered by the exception for preservation by archives, if such reproduction complies with the conditions laid down by this exception. A similar exception is provided in Article 46, 9°, for neighbouring rights.

#### **VI. *Social Institutions***

Such limitation did not exist and did not belong to the Belgian tradition. Article 22, §1er, 13° take on board such an exception and provides that the author can not prohibit "the reproductions of broadcasts made by hospitals, prisons, residential establishments for youth in difficulty ("aide à la jeunesse") or residential establishments for handicapped persons, upon the condition that such establishments do not pursue commercial purposes and that such the use of such reproduction is limited exclusively to the persons residing in such establishments". No compensation scheme has been put in place. A similar exception is provided in Article 46, 12°, for neighbouring rights.



## **VII. *Teaching and Scientific Research***

The use of works for the purpose of illustration for teaching is divided into five separate provisions:

Article 21, §2 (that existed before the transposition) allows the makers of an anthology that is aimed at teaching, to not ask for the authorisation of the authors whose works (or rather extracts of works) are included in such an anthology. This exception (more exactly it is a non-voluntary license) applies only to works after the death of their author. The other conditions for this exception are the following: the teaching should not seek economic or commercial advantage, whether directly or indirectly; the choice of the extract, its place and presentation in the anthology should respect the moral rights of the author; and an equitable remuneration should be paid, to be agreed upon by the parties or, by default, to be determined by the court. This peculiar exception could be considered either to be legitimised by the grandfather clause of Article 5 (3) (o) EUCD, or to be included in the use for illustration for teaching.

Article 22, §1er, 3<sup>o</sup>: prior to the transposition, this provision allowed for the acts of private communication within the family circle, which was traditionally said not to be an exception but rather the inverse definition of what a communication to the public meant. The transposition law of 2005 added to that Article the acts of communication carried out in the framework of school activities. The scope of this new exception is unclear. It seems that its purpose was to exempt acts of communication of works that could occur during a teaching in a classroom that would not be technically covered by the exception provided for by Article 22, §1er, 4<sup>o</sup>quarter (see below) that covers only online acts of communication for educational purposes. The example of communication of works through a PowerPoint presentation was given during the parliamentary discussion.

Yet, one could also construe the notion of "school activities" to cover more broadly any activity organised by the school and proposed to the pupils, such as the screening of a film during recreational times or playing of music during activities organised by the school. Should that be the case, such an exception would go beyond the strict purpose of illustration of teaching permitted by the directive, and either would be justified under the grandfather clause (thus limited to analogue use) or would contradict the exhaustive list of permissible exceptions Directive.

It should be noted that the exemption of acts of private communication within the frame of school activities has been copied from Article 46, 3<sup>o</sup>, of the copyright act that provided such a similar exception to neighbouring rights prior to the transposition law (and still does). There has been no case law explaining that notion of school activities in the frame of this exception to related rights. This exception also applies to databases by analogy (Article 22bis, §1er, in fine).

Article 22, §1er, 4<sup>o</sup>bis: the copyright act, prior to the transposition of the directive, already knew an exception for acts of reproduction (solely for reproduction) with the

purpose of illustration of teaching of scientific research. This Article has been modified to fit with the criteria of the directive.

This exception has two parts, one appearing in Article 22, §1er, 4°bis, that covers analogue copies for illustration of teaching (similar to reprography), and the other in the Article 22, §1er, 4°ter, that covers digital copies made for illustration of teaching. This division might be explained by the need to set up a different system of levy for each type of copy since the devices concerned are rather different.

Alinea 4bis thus concerns "acts of reproduction in part or in whole of articles and works of plastic art, and reproductions of short fragments of other works, when such reproduction is made on paper or any similar medium and by any photographic technique or a method leading to a similar result, for the purpose of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose to be achieved and that does not prejudice the normal exploitation of the work, as long as the source, including the author's name, is indicated, unless this turns out to be impossible".

It should be noted that this new provision will enter into force once the regulatory measure prescribed to organise the levy system accompanying it will be put into operation. A single levy system (organised under Article 59-61 Copyright Act) will be set up to receive the remuneration to compensate the right holders for acts of reprography (Article 22, §1er, 4°) and for acts of copies for illustration of teaching (Article 22, §1er, 4°bis). A similar exception also applies to databases (Article 22bis, §1er, 2°).

Article 22, §1er, 4°ter: alinea 4°ter concerns digital copies for the purpose of illustration of teaching or research. Such an exception already existed prior to the transposition, albeit in a slightly different form. The new Article 22, §1er, 4°ter exempts the "reproduction in part or in whole of Articles and works of plastic arts and reproductions of short fragments of other works when this reproduction is made on other medium than paper or similar, *and by any photographic technique or a method leading to a similar result*, for the purpose of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose to be achieved and that does not prejudice the normal exploitation of the work, as long as the source, including the author's name, is indicated, unless this turns out to be impossible".

The only difference to the previous Article is the type of medium on which the copy is made, since here only non-paper copies are concerned. The mention of "*and by any photographic technique or a method leading to a similar result*", which refers to reprographic technique is at odds with the purpose and scope of this provision. It is a material error that has subsisted in the enacted law, even though that mistake was pointed out during the parliamentary discussion<sup>183</sup>.

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<sup>183</sup> Given its urgency, it was decided by the Senate not to accept further amendments, even merely formal ones, to the text voted on by the Chamber of Representatives, which explains that such a mistake remains in the text.

This exception is compensated by a levy system organised under Articles 61bis to 61quater, and by a regulatory measure yet to be adopted. The educational establishments carrying out such acts of reproduction are held liable of the payment of such remuneration that would be proportional to the acts carried out. A similar exception also applies to databases (Article 22bis, §1er, 3°)

Article 22, §1er, 4°quater: alinea 4°quater is a brand-new provision resulting from a difficulty raised by the former legal provisions which only exempted acts of *reproduction* and not acts of *communication*. Therefore, distance learning activities could not benefit of an exception for illustration of teaching. Rather than opting for an exemption for any acts of use for the purpose of illustration of teaching (as the broad term used by Article 5(3)(a) suggests), the Belgian lawmaker chose to distinguish different acts in different legal exceptions. That explains the alinea 4° quater that deals only with communication to the public in an online environment. Such a division in many Articles also enabled to require more conditions for the act of communication than for the acts of reproduction. Alinea 4° quater exempts: "the communication of works when this communication is made for the purpose of illustration for teaching or scientific research by establishments officially recognised or organised to this end by the public authorities, and to the extent that this communication is justified by the non-commercial purpose to be achieved, takes place in the framework of the normal activities of the establishment, is carried out solely through the closed transmission networks of the establishment and does not prejudice the normal exploitation of the work, and as long as the source, including the author's name, is indicated, unless this turns out to be impossible".

Many conditions are thus required to be entitled to benefit from the exception: the exception is limited to official establishments of education and research. It will not benefit acts carried out by commercial companies organising training or online teaching, or other institutions carrying out training (even for non-commercial purposes). This seems at odds with the Directive, which defines the condition of the non-commercial purpose under Article 5(3)(a) in accordance with the nature of the activity carried out as such, without adding an express condition related to the structure of the education provider. This condition is not even required for acts of reproduction for illustration for research purposes, which is said (by the parliamentary documents) to include educational or training activities organised by associations not pursuing an educational purpose, such as institutions providing training to the unemployed. The educational establishment should pursue a non-commercial purpose. The communication belongs to the normal educational activities of the establishment, which can be construed as requiring that the exception is limited to courses of study included in a normal curriculum and programs of the establishment and provided to the students regularly registered.

The communication should take place in the "closed transmission networks" of the establishment. This notion is not defined in the law. During the parliamentary discussions, it was explained as referring to the fact that the course should be provided to students or researchers via an intranet of the establishment, hence with the requirement of prior identification (password or other log-in procedure). The notion is not limited to the hardware of the establishment. The network and the management of

access authorisations should be under the responsibility of the educational/research establishment. The exception could not be used to justify any dissemination online of copyrighted work included in an educational material. Thereby, it will not apply to communication of material through email or to video-conferencing not restricted to the intranet of the school.

The normal exploitation of the work should not cause harm, which repeats one criterion of the 3-step test. The source of the work and the name of the author should be indicated, when possible. This exception is compensated by the same levy system as that referred to in the previous Article, and is similarly organised under Article 61bis-quarter Copyright Act. A similar exception also applies to databases (Article 22bis, §1er, 3°). It existed before the transposition, but was slightly modified to add the condition of the "closed transmission networks of the establishment".

Exceptions for education and research also apply to related rights, even though the system is slightly different: Article 46, 3°, provides for an exemption of acts of private communication occurring during school activities. There is no fair compensation. Article 46, 3°bis, provides for an exception for acts of reproduction made for the purpose of illustration of teaching and scientific research under the same conditions as for copyright. There is no distinction between the analogue or digital copies though. Article 46, 3°ter, provides for an exception for acts of communication for the purpose of illustration of teaching and scientific research under the same conditions than Article 22, §1er, 4°quarter (see above).

The system of levies provided for acts of digital reproduction and communication on line organised by Article 61bis-quarter also applies to the exception provided to related rights.

### **VIII.** *Disabled People*

The Belgian law did not have any exception for the benefit of handicapped people. The transposition law of 2005 has added such exception in Article 22, §1er, 11°, according to which the reproduction and public communication of works for the benefit of people with a disability is permitted. This is subject to acts directly related to the disability and activities of a non-commercial nature, and to the extent required by the specific disability. It is permitted insofar they do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holders. Save for the explicit allusion to the two conditions of the three-step test, the exception has been taken literally from the directive. A similar exception applies to related rights under of Article 46, 10° Copyright Act.

### **IX.** *Current Economic, Political or Religious Topics*

Article 22, §1er, 1°, already exempted the "reproduction and communication to the public by the press, communication, in the purpose of information, of short fragments of works or of whole works of plastic arts in connection with the reporting of current

events". This exception has not been modified by the transposition, but the obligation to mention the source including the author's name (that appeared at Article 22, §2) has been slightly modified. Now, this does not apply unless impossible; the extent of the reproduction and communication have to be justified by informatory purposes. There is no fair compensation provided. This exception also applies to related rights (Article 46, 2°) to databases by analogy (Article 22bis, §1er, *in fine*), even though the possible hypothesis for an application to database seems unclear.

#### **X. *Quotations***

An exception for quotations existed before the transposition of the Directive. It has been slightly modified. Article 21, §1er, now states that "quotations, from works lawfully published, made for purposes of criticism, polemic, review, education, or in scientific works, in accordance with fair practice of the profession and to the extent justified by the purpose to be achieved, do not infringe copyright. Such quotations shall mention the source and the author's name, unless this turns out to be impossible". The modifications resulting from the 2005 modifications are: the requirement of the shortness of the quotation has been suppressed. Under the former provision, a quotation had to be short, which excluded from its scope quotation of paintings or graphical works. The purpose of review has been added and the requirement of the indication of the source/author's name, that was absolute before, has been qualified when such an indication would be impossible. This exception also applies to related rights (Article 46, 1°)

#### **XI. *Public Security***

Such exception applies only to copyright in database (Article 22bis, 5°) and results from the transposition of the Database Directive in 1998. It has not been modified in 2005.

#### **XII. *Architectural Works etc.***

This exception existed in the copyright law and exempts (Article 22, §1er, 2°) the "reproduction and communication of a work exhibited in a place accessible to the public, when the purpose of the reproduction or communication is not the work itself". This has not been amended. It also applies to databases by analogy (Article 22bis, §1er, *in fine*), even though the possible hypothesis for an application to database seems unclear.

#### **XIII. *Advertising for Public Exhibitions etc.***

Such an exception did not exist so far (even though some case law has admitted this practice) and has been added by the new Article 22, §1er, 12°, which permits the "reproduction and public communication aiming to advertise public exhibitions or sales of artistic works, to the extent necessary to promote the event, excluding any other commercial use". The text is similar to that of the directive. The exception has been said to be strictly limited to the purpose of promotion and will not cover the exhibition itself or the sales of art reproduction. This exception also applies to related rights (Article 46, 11°).

#### **XIV. *Caricature and Parody***

Such exception existed before, and was left unaffected.. Article 22, §1er, 6°, exempts caricature, parody or pastiche, according to fair practice. This exception has been limited by case law to parodies made with the intention of humour. The parody should not cause confusion with the parodied work or have the intention to harm the work or its author. This exception also applies to related rights (Article 46, 5°) and to databases by analogy (Article 22bis, §1er, in fine), even though the possible hypothesis for an application to database seems unclear.

#### **XV. *Research or Private Study***

This exception has been introduced in the law (Article 22, §1er, 9°) by the transposition process, and allows "the communication, including the making available to individuals, for the purpose of research or private study, of works not subject to purchase or licensing terms, which are contained in collections of publicly-accessible libraries, educational or research establishments, museums or archives, that do not pursue any commercial or economic purpose, whether directly or indirectly, to by dedicated terminals accessible on the premises of such establishments". The exception is restricted to use on dedicated terminals, which has not been further defined by the law or preparatory documents. This exception also applies to related rights (Article 46, 8°).

#### **XVI. *Uses of 'minor importance'***

Article 22, §1er, 7° exempts the execution for free of a work during a public exam, when the purpose of the execution is not the work itself , but the evaluation of the performer(s) in order to deliver him/her/them a diploma or certificate in the framework of a recognised type of education. This exception mainly covers the execution of works during exams in music or theatre schools. The explanatory memorandum of the transposition bill states that it is a use of minor importance, is by nature an analogue use of the work and is thus covered by Article 5 (3)(o) EUCD. This exception also applies to related rights (Article 46, 6°) and to databases by analogy (Article 22bis, §1er, in fine), even though the possible hypothesis for an application to database seems unclear.

### **C. Compensation system**

The levy system has been largely modified. The remuneration is still perceived on devices enabling the making of a private copy and on the blank tapes.

The criterion is that the devices and media should be manifestly (*manifestement*) used for private copying. This aspect was discussed at length and now is to be determined by an arrêté-royal, which may exclude some devices from that list when they are not manifestly used for making private copies. See also above on compensation by a levy system in the case of exception for teaching and scientific research. There was a fiery discussion in the Parliament as to whether the computers should be considered as devices enabling private copy and hence submitted to the remuneration. They were excluded from the levy system by the original bill. The computer industry and many economic sectors using

computers wanted that computers be excluded by the law altogether. Finally, the law provides that computers will be subjected to the levy solely through adopting an *arrêté-royal délibéré en Conseil des ministres*, which is a regulatory measure that has a special status and requires more formalities.

Should computers be included in the list of devices on which a levy is to be imposed, this might cause problem with regard to those persons and entities liable to pay it. Given the need to ensure equal access to information and communication technologies, certain categories of those liable may have to be exempted or eventually reimbursed if the liability under the levy does impede access, and also because the need to ensure that people who acquire computers for purposes other than private copy would not pay the levy.

Other changes are the establishment of a Consultation Committee of stake-holders who report to and advise on the levy system. There was (and still is) no explicit restriction to natural persons but the reference to the family circle implies that the private copy can only benefit a private person (contrary to reprography). In addition, the application of technological measures has to be taken into account when determining the level of levy to be perceived for private copy (see Article 56). A similar exception (including the levy system) is provided in Article 46, 4°, for neighbouring rights.

## **D. Protection of Technological Measures**

The rules related to the protection of technological measures have been introduced by the new Article 79bis and 87bis of the Copyright Act, as well as by Article 12bis of the law of August 31<sup>st</sup>, 1998, and by Article 2bis of the law of August 11th, 1998, as far as the sui generis right in database is concerned.

### **I. The definition of 'effective' technological measures**

The definition of the technological measures has been copied from the directive. Article 79bis, §1er, al. 4-5, states that a technological measure is "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or performances, which are not authorised by the right holder of any copyright or any right related to copyright".

Technological measures is "effective" where the use of a protected work or performance is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective." The explanatory memorandum further explains that the aim of the "effective" criteria is to protect only the "serious" technological measures.

## II. *Acts of circumvention*

Article 79bis, §1er, al. 1, prohibits the act of circumvention of an effective technological measure and apply to it the sanctions traditional to counterfeit (criminal sanctions, see below). Two conditions apply for the circumvention to be prohibited.

The first is taken from the directive: the person who circumvents should know or have reason to know that she is doing so. The second one is more peculiar: the person who circumvents should know or have reason to know that such a circumvention could facilitate a copyright infringement.

The scope of such requirement is unclear. It has been included through an amendment that aimed at safeguarding copyright exceptions and particularly private copy. Its purpose could hence be that the circumvention of a technological measure in order to benefit from an act that is not considered as a copyright infringement, including a copyright exception, will not be prohibited. Some have said that the provision mentions that it suffices that the circumvention *could* facilitate the infringement and does not require an actual infringement. In their view, the fact that the circumvention leaves the work unprotected suffices for the condition to be met. This opinion seems contradicted by the clear intention of the parliament members who have introduced this amendment and whose objective was clearly to facilitate the enjoyment of copyright exceptions<sup>184</sup>.

But this Article further provides that "the act of circumvention shall be deemed to facilitate a copyright infringement". Therefore, after having required a knowledge element of the possible infringing effect of the circumvention, the law presumes that this element of knowledge is satisfied and thus reverses the burden of proof. It seems that the presence of this presumption was a response to opponents to the requirement of a link between the circumvention and the subsequent copyright infringement, as a compensation of the favour that had been done, by that requirement, to the proponents of the copyright exceptions.

It should also be noted that the new Article 12bis of the database law of 31 August 1998, prohibiting the circumvention of technological measures, does not refer to a knowledge requirement with respect to a possible copyright infringement. As far as the circumvention of a technological measure protecting a sui generis right is concerned, no exception could excuse the act of circumvention. That different treatment of databases protected by copyright and databases protected by the sui generis right appears difficult to reconcile.

## III. *Commercial Dealings in Circumvention Devices*

Article 79bis, §1er, al. 2 Copyright Act is copied from the Directive and imposes sanctions upon anyone who manufactures, imports, distributes, sells, rents, advertises for sale or rental, or possesses for commercial purposes, devices, products or components,

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<sup>184</sup> Amendment n°142 of Mme Déom et consorts, *Doc. Parl.*, Ch. Rep., sess. 2003-2004, n° 1137/012.



or provides services which (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

#### **IV. *Beneficiaries of limitations and technological protection measures (Article 6 (4))***

The solution for the enjoyment of copyright exceptions, according to Article 6(4) EUCD, is laid down in Articles 79bis, §2-3 and 87bis of the law (as in Article 12bis of the database law of 31/08/98).

Article 79bis, §2, requires right holders to take adequate voluntary measures, within a reasonable period, to provide beneficiaries of certain exceptions (see below) with the means to benefit from those. As provided by the Directive, only the beneficiaries of an exception who have legitimate access to the work or object protected by a related right are concerned.

The measures to be taken by the right holders are said to be voluntary, but failure to do so gives beneficiaries the opportunity to litigate under Article 87bis Copyright Act (see below). Therefore, the voluntary nature of such measures refers rather to their content or modalities. The measures should also be adequate, which is a (welcome) addition to the Directive. The explanatory memorandum refers to the conclusion of agreements between right holders and users or other concerned parties, as in the directive.

§3 of Article 79bis repeats Article 6(4)(4) EUCD and excludes the obligation to take safeguarding measures for works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. The same obligation is imposed upon holders of a *sui generis* right in a database.

The limitations covered under Article 79bis concern: the making of an anthology; reprography; analogue and digital reproductions for the purpose of illustration for teaching or scientific research; exceptions for the preservation of cultural and scientific patrimony; ephemeral recordings made by broadcasters; the exception for the benefit of disabled people; the exception for social institutions – this exception is not included in Article 79bis, but this appears to be an oversight as it appears in Article 87bis, that includes that obligation.

The list of exception thus follows the exceptions listed in the Article 6(4) EUCD. The exception covering the acts of communication for the illustration of teaching and scientific research has been overlooked by the lawmaker however. It should have appeared in the list since it is listed in the exceptions of Article 6(4).

The private copy is not included in the list. But the law provides that a regulatory measure (an "arrêté-royal" deliberated in the Council of Ministers) can apply this

safeguarding solution to the private copy to the extent it does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the right holders.

The obligation to take voluntary measures also concerns: the exceptions to a copyright in a database: private copy of a non-electronic database, the copy and the communication of a database for the illustration of teaching/research; the use of a database justified by public security and additionally the exceptions to a sui generis right in a database in relation to : private extraction of a substantial part of a non-electronic database; extraction or use of a part of a database for purposes of illustration of teaching or scientific research; extraction or use of a part of a database for purposes of public security.

## **V. *Enforcement of Limitations***

Article 87bis offers beneficiaries to immediately take recourse to the judiciary.

The president of the tribunal of first instance has power to establish a violation of Article 79bis, §2, i.e. the lack of adequate measures enabling the user to benefit from the exceptions concerned. The president can order right holders to take the necessary measures. The conditions are the same as those applying to the obligation to take measures (restricted list of exceptions concerned, legitimate access to the work).

The following persons can bring such an action before the court: the beneficiaries of the exceptions themselves; the minister in charge of copyright legislation; any professional association (e.g., an association representing libraries or educational establishments) and any association protecting the interests of consumers inasmuch as it is officially recognised.

This peculiar action will have the form and modalities of an enjoyment procedure (*référé*) and should thus be rapidly decided.

Generally, the beneficiaries of exceptions were satisfied with the solution of a court procedure. The only discussion evolved around the private copy that the consumer associations wanted to include in the list of the exceptions to be protected against technological measures. They fail even though the law enables the government to eventually change the law on that point.

## **E. Rights Management Information**

Article 7 has been transposed literally in Article 79ter of the Copyright Law and in Article 12ter of the database law.

The relevant provisions sanctions any person who knowingly performs without authority any of the following acts: (a) the removal or alteration of any electronic rights-

management information; (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright.

The expression "rights-management information" is defined, as in the directive, as "any information provided by right holders which identifies the work or other subject-matter, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information".

The protection of the rights management information shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject matter. A similar protection has been introduced in the law of 31.08.98 on the sui generis of database.

## **F. Sanctions**

No specific sanctions have been introduced. The traditional sanctions apply to circumvention acts of technological measures and to the suppression of rights management information. At the criminal level, a copyright infringement is an offence punishable by a fine of up to 2500 € (however, under Belgian law fines are multiplied by the so called "décimes additional", which means 200 times the amount of the fine. The maximum fine can therefore be 500 000 €). In the event of a repeated offence, Article 81 provides for a sentence of three months to two years and/or a fine of 2,5 to 2500 €. Actual or constructive (i.e. having grounds to know) knowledge will be sufficient to be criminally liable. Remarkably, this is a lower threshold than the ones that are normally required for copyright infringements. Indeed, only copyright infringements that are made with the intention to make an undue profit out of the infringement or with the intention to harm the copyright holder are punishable under criminal law.

Article 87 of the Copyright Law provides an injunction procedure called "action en cessation" that aims at stopping infringing activities. The Articles dealing with technological measures and rights management information does not explicitly refer to that injunction procedure. Nevertheless, the explanatory memorandum states that such an injunction will be open to any person harmed by a circumvention activity.

The law on intermediaries has not been modified by the transposition and is still regulated by the law on the information society of 11 March 2003 which transposed the E-Commerce Directive into Belgian law. The provisions of this law are similar to the e-commerce directive. It should be noted however that in a recent court decision it has been specified that the exoneration of liability for access providers did not prevent an injunction from taking place. *Tiscali*, an Internet access provider, was thus enjoined to put in place filtering mechanisms to stop the downloading of protected works that is done by its subscribers. That case is still pending and one waits the conclusions of the

technical experts who have been mandated to assess the possibility to apply such filtering technique.

## **G. Conclusion**

The main disparity relates to the prohibition of the circumvention act that appears to be limited to cases where the circumvention facilitates copyright infringement.

Another idiosyncrasy concerns the mandatory nature of the exceptions and its limited scope when works are made available on demand.

The peculiar transposition of the prohibition on acts of circumvention appears to permit circumvention to benefit from an exception, because the act of circumvention is prohibited only if done with the intention or constructive knowledge that such act would eventually result in copyright infringement. As noted, however, the actual scope of this provision is unclear.

The possibility for beneficiaries of the exceptions to sue right holders who disregard to take adequate measures preserving the exceptions might help users to benefit from the exceptions despite the presence of technological protection measures. However, the cost of such judicial procedure might be high and dissuasive. Besides, such a solution might generate different judicial interpretations from one court to another with respect to the measures to be imposed upon right holders. A centralised administrative procedure would not meet the same criticism. It should also be noted that this solution, in the line of the directive, will not apply to the making available of work on demand and that the contractual provisions will prevail in such a case.

In other cases, the contract might not prohibit the use of a copyright exception, since the exceptions are considered as being imperative in the Belgian law. However, when purchasing a CD or a DVD, there is generally no contract that is entered by the user with the right holder. Therefore, the technological measure encapsulating the work and impinging the benefit of an exception should be considered as a unilateral act from the right holder and not as a contract or as a measure executing a contract that has not taken place. Consequently (and somewhat paradoxically), it is difficult to see in practice how a user could refer to the mandatory nature of the exception to invalidate the technological measure.

Consequently the mandatory nature of the exception will disappear when a contract is entered to provide users with works upon their individual demand. According to the explanatory memorandum, the motive for such a limitation to the mandatory nature of the exception is to be found in Article 6(4)(4) of the European directive which enables not to devise measures to safeguard the exceptions when works are made available on demand and are protected by technological measures. The lawmaker felt that the mandatory nature of the exceptions that we know in Belgium was in contradiction with

this provision of the directive. It was also said that, without such a modification, the development of online sales of works on demand could be harmed.

It can be argued that, since Article 6(4)(4) EUCD only deals with the interface between exceptions and technological measures, it does not prevent exceptions from being considered imperative. Such a qualified imperative nature has also unexpected consequences. Since the exception for the temporary reproduction is now covered by this mandatory nature, would it mean that contracts can prevail over this exception, and prohibit the temporary copy, when making works available on demand? Such an example demonstrates that this modification of the imperative nature of the exceptions is too far-reaching.

The same qualification of the mandatory nature of the exceptions has been introduced in the law of 31/08/98 transposing the Database Directive into Belgian law. It is argued that abandoning the mandatory nature of the exceptions to the sui generis right is contrary to Article 15 of the Database Directive and is not permissible under the EUCD.

Beyond that, no significant disparities exist.

## V CYPRUS

The Directive was implemented on 30 April 2004. The relevant legislative instrument is the Copyright and Related Rights (Amendment) Law of 2004 (Law n° 128(I)/2004, Official Gazette of the Republic of Cyprus, n° 3850, 30.04.2004). This law modified the basic law on copyright (Law n° 59 of 1976, as it has been modified by Law n° 54 of 1999, Law n° 12(I) of 2001 and Law n° 128(I) of 2002). There was no national consultation process. The Directive was implemented following a draft undertaken by the Law Office of the Republic in consultation with the Department of the Registrar of Companies and Official Receiver, which is the competent copyright authority in Cyprus. The implementing legislation came into force by publication of this legislation in the Official Gazette of the Republic, dated 30 April, 2004.

### **A. Exclusive rights**

The implementation of exclusive rights is effected through Sections 7, 7A, 7B, 7C, 7D, 7E and 7F. The existing statutory text was amended by the addition of Section 7F.

#### **I. *Reproduction Right***

The beneficiaries of the right of reproduction after the implementation are authors of literary and artistic works; performers of fixations of their performances; phonogram producers for their phonograms; producers of first fixations of films; and broadcasting organizations. There are no divergences with respect to the Directive. Prior to the implementation, the law did not distinguish between temporary and ephemeral reproductions on the one hand and permanent reproductions on the other. Short lived acts of reproduction were recognized and still are recognised as infringement of the reproduction right. Now, according to paragraph 2. (a) of the implementing Law n° 128 (I) of 2004, the term « reproduction » is defined as the direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of scientific works, literary works, works of music, artistic works, films or audio recordings, databases or emissions.

#### **II. *Communication to the Public***

There were no provisions concerning the non - simultaneous receptions of electronic communications prior to the implementation of the Directive nor were acts of public interactive communications recognised under the previous copyright law.

Article 7(1) (a) (vi) now provides that copyright confers the exclusive right of control in the territory of the Republic over the following acts :

(vi) the communication to the public of works, by wire or wireless means and the right of making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

### **III. *Distribution Right***

Prior to the implementation, Article 7(1)(a) (iii) provided that copyright confers the exclusive right of control over the sale, rental, distribution, lending, and exhibition to the public of the original or of copies of a work. This provision remained unchanged. The national rule on exhaustion of the distribution right was contained in Sec. 7(1) (b). According to this, the right of the author to control the sale and the distribution right shall be exhausted within the Community only where the first sale or other transfer of ownership in the Community of the original or copies is made by the right holder or with his consent. Exhaustion does not extend to non-physical transactions. Moreover, copyright law in Cyprus does not permit restrictions upon the distribution right by way of restrictive licenses.

## **B. Exceptions and Limitations**

Some specific non-mandatory limitations have been implemented. Existing limitations have been modified in order to be in full compliance with the Directive. Such modifications or deletions are contained in Section 3 (a), (b), (c), (d) and (f) of the Copyright and Related Rights (Amendment) Law of 2004. It is generally believed that the three step-test (*Article 5 (5)*) has been applied in practice as from the time the original Copyright law was enacted. There was no specific provision in the copyright law of Cyprus prior to the implementation and it has not been implemented. There is also no reference to the test in court decisions.

### **I. *Transient Copies***

Article 5 (1) of the Directive has been implemented by Section 3(9) of the Copyright and Related Rights (Amendment) Law of 2004 <sup>185</sup>.

Temporary acts of reproduction are exempt from the exclusive right of reproduction, provided that they are transient or incidental, such as acts which enable browsing or acts of caching, including acts that enable the efficient functioning of transmission systems, and provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, as normally recognized and used by the industry to obtain data on the use of information. The notion of temporary acts of reproduction is defined in Section 2 (d) of the implementing Law of 2004 and it is added

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<sup>185</sup> Section 3 modified Article 7 of the basic copyright law. Section 3(9) added a new paragraph (5) in Article 7.

to the catalogue of definitions of Article 2 of the basic copyright law. The definition is in full compliance with the Directive and follows its wording.

Sec. 3 (9) has been formulated as a copyright limitation.

## **II. Reprography**

A provision concerning the private copying exception existed previously. The existing provision is general, refers to all the rights of the author (generally to acts conducted for private use) and not only to acts of reproduction for private use.

According to this provision, copyright does not give control over acts which fall in the scope of rights of the author, provided that they are carried out in good faith for purposes of research, private use and/or criticism or illustration of current events. In case such acts result in a public use, the title of the work and the author must be referred to. Private copying was not subject to a levy or fair compensation. This provision has not been modified due to the implementation.

A more specific provision was implemented by Section 3(8) of Law of 2004, which added a new paragraph to Article 7 of the basic copyright law. According to paragraph 15 (*ο ορ ιε*) of Article 7), copyright does not confer control over reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that right holders receive fair compensation which takes account of the application or non application of technological measures.

A limitation concerning reproductions on paper or any similar medium has been introduced to the copyright law of Cyprus by the implementing law of 2004. According to paragraph 16 (*ρ ορ ιοτ*) of Article 7 of the basic copyright law, copyright does not provide control over reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation.

## **III. Private Copying**

As it has been already mentioned (3), a limitation of reproduction for private use already existed (Section 7(2) (a) of the Principal Copyright and Related Rights Law). A more restrictive provision was added by the implementing law of 2004. There was, previously, no express restriction to natural persons, and the law was updated accordingly. Section 3(8) of Law of 2004 now added a new paragraph to Article 7 of the basic copyright law. According to paragraph 15 (*ο ορ ιε*) of Article 7, copyright does not confer control over reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that than right holders receive fair compensation which takes account of the application or non application of technological measures. There is an express requirement to take the application of technological measures into account.



#### **IV. Libraries, museums and archives**

Such limitation already existed under Section 7(2).10 (*j or i*) of the basic copyright law. It has been modified by the implementing law of 2004 in order to be harmonized with the exact wording of the Directive, although there were not any important differences. More precisely, the modification was that educational institutions and museums were added to the catalogue. Prior to the implementation, the limitation was restricted to non commercial uses and after the implementation still does so. The exact wording of the provision is that these acts of reproduction are permitted on the condition that they do not offer any financial benefit and that they are not subject to any payment.

#### **V. Broadcasters**

Article 5 (2) (d) (Ephemeral Recordings by Broadcasters) is covered by Section 7 (2) 11 (*k or ia*) of copyright law as it has been modified by the implementing Law of 2004. This limitation has already existed, but the existing provision was modified due to the implementation. Copyright law permits the archiving of copyrighted material by broadcasting organizations when the material is a documentary of exceptional historical interest. The reproduction of such documentaries cannot be used for broadcasts, or for any other purpose without the consent of the right holder.

#### **VI. Social Institutions**

This limitation did not exist prior to the implementation. It was implemented in Article 7 (2) of the basic copyright law by the addition of a new paragraph 7 (2) 17 (*q or iç*). This limitation is subject to fair compensation, but there is no compensation scheme in place.

#### **VII. Teaching and Scientific Research**

A limitation concerning the use of works for the purpose of illustration for teaching has already existed (Article 7 (2) 5 (*e or ε*) of the basic copyright law). It doesn't cover the use of works for scientific research but only illustration for teaching. The indication of source is required and it is no subject to fair compensation.

However, the implementing law of 2004 added a new paragraph to Article 7 (2) of the copyright law, which deals with the same limitation. The already existing limitation under Article 7 (2) 5 (*e or ε*) remained unchanged.

A new paragraph 18 (ıı) of Article 7 (2) provides that use of works for the purpose of illustration for teaching or scientific research is permitted as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved. The implementing provisions followed the wording of the Directive and they were a literal translation of these provisions. The limitation concerns «use» in general and consequently both acts of reproduction and communication to the public are covered. There is no requirement for fair compensation.

### **VIII.** *Disabled People*

This limitation did not exist in copyright law before the implementation of the Directive. It was implemented by the addition of a new paragraph to Article 7(2) of the basic copyright law. The implementing provisions followed the wording of the Directive and they were a literal translation of these provisions. According to Article 7(2) 19 (*s or tθ*) of the basic copyright law, copyright does not confer control over uses for the benefit of people with a disability which are directly related to the disability and of non-commercial nature, to the extent required by the specific disability. The limitation concerns « uses » in general and consequently both acts of reproduction and communication to the public are covered.

### **IX.** *Current Economic, Political or Religious Topics*

There was a limitation for press prior to the implementation (Article 7(2) 14 (*n or ιδ*) of the basic copyright law). It was narrower than the limitation of Article 5 (3) (c) of the Directive. It covered the reproduction by press or communication to the public only of public speeches, lectures or other works of the same nature. The existing limitation covered both acts of reproduction and public communication and it did not require the indication of the source, including the author's name.

However, this limitation was modified. The implementation followed narrowly the wording of the Directive and made the limitation broader. According to a new Article 7(2) 14 (*n or ιδ*), compensation is not required, but an indication of source is. The limitation covers both acts of reproduction and communication to the public. It covers reproductions by the press, communication to the public or making available of published articles on current economical, political or religious topics or of broadcast work or other subject matter of the same character. It also covers the new Article 7(2) 14 (*n or ιδ*) dealing with the use of works in connection with the reporting of current events, to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated.

### **X.** *Quotations*

This is covered by Article 7 (2) 6 (*f or στ*) Copyright Act. the exception for making quotations previously existed and remains unchanged. There is no restriction to criticism or review purposes, and the limitations therefore appears broader than Article 5 (3) (d) EUCD. However, the following restrictions apply. The quotation must not conflict with honest practice; the extent of such quotation must not exceed the extent justified for the purpose; the source, including the name of the author, is indicated; and the work must have been published with the author's consent.

Moreover, according to Article 7(2)7 (*g or θ*), copyright does not confer control over the reading to the public or reading during an emission of extracts of literary works which have been legally published provided that the source is indicated. The extent of the extract must be fair. This limitation, which deals with a more specific aspect of the quotation right, remained unchanged.

## **XI. *Public Security***

This limitation already existed (Article 7 (2) 13 (*m or ty*)), but it covered only uses for judicial speeches. The implementing Law of 2004 made it broader in full compliance with the provisions of the Directive. It covers both acts of reproduction and public communication (« uses » in general).

## **XII. *Speeches, Public Lectures etc. (Article 5 (3) (f) EUCD)***

Prior to the implementation this limitation was covered by Article 7 (2) 14 (*n or td*) (reproduction by press of speeches). This limitation was modified and is now covered under a new Article 7 (2) 14 (*n or td*).

## **XIII. *Architectural Works etc.***

This limitation already existed before the implementation of the Directive in two forms and remained unchanged. According to the provisions of Article 7(2) 3 (*c or y*) of the Copyright Law, copyright does not confer control over the reproduction and distribution of copies of artistic works permanently located in public places.

Moreover, according to 7(2) 2 (*b or β*), copyright does not confer control over the inclusion of any artistic work in a film or emission provided that they are located in places where they are visible to the public. In the second case, the work does not have to be permanently located in a public place. ‘Film’ is defined as a cinematographic or audiovisual work of moving images with or without sound.

## **XIV. *Incidental Inclusion***

This limitation pre-existed and it remained unchanged. It is provided in a restricted form. It only concerns artistic works and their inclusion in films and emissions under Article 7 (2) 4 (*d or δ*). According to this paragraph of Article 7 (2), copyright does not confer control over the incidental inclusion of an artistic work in a film or an emission. The notion of film is defined as cinematographic or audiovisual work or moving images with or without sound.

## **XV. *Caricature and Parody***

There is no express limitation concerning the use of a work for purposes of caricature, parody or pastiche. Such limitations are recognized under the non-statutory limitations of freedom of communication or press as these are safeguarded by the Constitution of 1960.

## **XVI. *Research or Private Study***

There is no specific limitation of this kind. A general limitation applies (Article 7(2) 18 (*r or uη*)) concerning the use of a work for the purpose of illustration for teaching or scientific research.

## **C. Compensation System**

There is no compensation system for analogues private copies, though a claim for fair compensation was introduced for cases of copies made under Article 5 (2) (b) EUCD, see above. A claim for fair compensation has also been introduced for copies made by social institutions (Article 5 (3) (e) EUCD). It should be noted that a general levy scheme is not in place.

## **D. Protection of Technological Measures**

The definition of technological protection measures is included in Article 2 (Section «definitions»). The provisions about the circumvention of technological protection measures are implemented in new Article 14B of the copyright law. The implementing law followed narrowly the definition of the Directive. The expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as well as the sui generis right of the database maker.

Moreover, according to paragraph 2 of the new Article 14 B literally implements the definition of 'effective' technological protection measures under Article 6 (3) EUCD.

### ***I. No prohibition of acts of circumvention***

The relevant provisions of the Directive were not implemented. There is no express reference in the Copyright Act. Although the Title of Article 14B of the Copyright Act refers generally to the «protection against the circumvention of technological measures», its content refers only to the prohibition of acts dealing in circumvention devices. However, it should be noted that Cyprus implemented Article 6(4)(4) EUCD, as explained below.

### ***II. Commercial Dealings in Circumvention Devices***

The provisions about the prohibition of acts dealing in anti circumvention devices of the Directive 2001/29/EC have been implemented without any deviations or changes. According to a new Article 14B (1) Copyright Act, any person who knowingly, or having reasonable grounds to know that he or she is pursuing that objective, and without the permission of the right holder manufactures, imports, distributes, sales, rents, advertises for sale or rental or possesses for commercial purposes devices, products or components thereof, or who provides services which: a) are promoted, advertised or marketed for the purpose of circumvention of, or b) have only a limited commercially significant purpose or use other than to circumvent, or c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures, commits offence and may be sentenced to a fine not exceeding CY 30000 pounds or to imprisonment not exceeding three years or to both the above penalties. There are also increased penalties in the case of second or subsequent conviction. This implements Article 6 (2) EUCD.

### III. *Limitations and Technological Protection Measures (Article 6 (4) EUCD)*

The provisions of Article 6 (4) of the Directive were implemented in paragraph 3 of Article 14B. According to this paragraph, the provisions of paragraph 1 of Article 14B do not affect the right holder's obligation to provide to the beneficiaries of the limitations provided in paragraphs 6 ( $\sigma\tau$ ), 10 ( $\iota$ ), 11( $\iota\alpha$ ), 13( $\iota\gamma$ ), 17 ( $\iota\zeta$ ), 18 ( $\iota\eta$ ) and 19 ( $\iota\theta$ ) of subsection 2 of the Article 7 (7.2) of the copyright law, the means in order to benefit from those limitations to the required degree, if they have lawful access. There is no administrative procedure to ensure the participation of beneficiaries. There are no views or proposals of beneficiaries taken during the implementation process. The limitations which are chosen generally correspond to the relevant list of limitations provided in Article 6 (4) of the Directive. These are:

- a) Article 7(2).6 ( $\sigma\tau$ ) : quotation for the purpose of criticism or review. It corresponds to the limitation of Article 5 (3) (d) of the Directive.
- b) Article 7(2).10 ( $\iota$ ) : limitations applying to specific acts of reproduction by public libraries, educational establishments or archives. It corresponds to the limitation of Article 5 (2) (c) of the Directive.
- c) Article 7(2).11( $\iota\alpha$ ) : ephemeral recordings by broadcasters. It corresponds to the limitation of Article 5 (2) (d) of the Directive.
- d) Article 7(2).13 ( $\iota\gamma$ ) : use for the purpose of public security. It corresponds to the limitation of Article 5 (3) (e) of the Directive.
- e) Article 7(2).17 ( $\iota\zeta$ ) : reproductions made by social institutions. It corresponds to the limitation of Article 5 (2) (e) of the Directive.
- f) Article 7(2).18 ( $\iota\eta$ ) : use of a work for the purpose of illustration for teaching or scientific research. It corresponds to the limitation of Article 5 (3) (a) of the Directive.
- g) Article 7(2).19 ( $\iota\theta$ ) : use for the benefit of people with disability. It corresponds to the limitation of Article 5 (3) (b) of the Directive.

However, it must be noted that the limitation of Article 7 (2) 6 ( $\sigma\tau$ ) of copyright law (*quotation : it corresponds to the limitation of Article 5 (2) (c) of the Directive*) is not included in the list of limitations of Article 6 (4) of the Directive.

The technological protection measures co-exist with the limitations. Under copyright law as it has been modified after the implementation, we should distinguish between the limitations which are mentioned in the paragraph 3 of Article 14B of Copyright Law and limitations which are not included in the list of limitations mentioned in this Article.

As it has already been analysed, as it concerns the limitations (exceptions) provided by Article 7(2) 6, 10, 11, 13, 17, 18 and 19, the provisions which introduce the technological

measures do not affect the obligation of the right holders to provide to the beneficiaries of these limitations the means to benefit from them.

A purchaser of a copy of a work would be probably allowed to exercise limitations under copyright law. However, there are no express provisions in Cyprus dealing with the relationship between consumer rights and technological protection measures. There are no such provisions under contract law, which provides that this law is violated and the anti-copying device can be considered as illegitimate by the application of technological protection measures.

## **E. RIGHTS MANAGEMENT INFORMATION**

The provisions of the Article 7 of the Directive were implemented without changes in new Article 14C of copyright law (Sanctions about the alteration of rights - management information). According to this : « 1. Any person who is knowingly performing one of the following acts : (a) the removing or alteration of any rights - management information without authority (b) the distribution, importation for distribution, broadcasting, communication of making available to the public of works or other subject-matter protected under this law from which electronic management information has been removed without authority if such person knows or has reasonable grounds to know that he by so doing is inducing, enabling, facilitating or concealing an infringement of copyright or any rights related to copyright as provided by law or of the sui generis right of the database maker, commits offence and may be sentenced to a fine not exceeding CY 30000 pounds or to imprisonment not exceeding three years or to both the above penalties.

There are also increased penalties in the case of second or subsequent conviction. (implementing the Article 7 par. 1 (a) and (b) of Directive 2001/29).

The definition of the expression "rights management information" is provided in Article 2 of copyright law (definitions). According to this, the expression "rights management information means any information provided by right holders which identifies the work or other subject-matter protected by a related right or the sui generis right of database maker, and which identifies the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information. (implementing the Article 7 par. 2 of Directive 2001/29).

## **F. Sanctions**

Specific sanctions were introduced against the manufacture or disposition of devices or products or the provision of services which are promoted for the purpose of circumvention .According to new Article 14 B, any person who knowingly commits the offence may be sentenced to a fine not exceeding CY 30000 pounds or to imprisonment

not exceeding three years or to both the above penalties. There are also increased penalties in the case of second or subsequent conviction.

Specific sanctions were also introduced for the violation of provisions concerning the rights-management information. According to new Article 14C of the copyright law, any person who is knowingly performing one of the following acts : (a) the removing or alteration of any rights - management information without authority (b) the distribution, importation for distribution, broadcasting, communication of making available to the public of works or other subject-matter protected under this law from which electronic management information has been removed without authority if such person knows or has reasonable grounds to know that he by so doing is inducing, enabling, facilitating or concealing an infringement of copyright or any rights related to copyright as provided by law or of the sui generis right of the database maker, commits offence and may be sentenced to a fine not exceeding CY 30000 pounds or to imprisonment not exceeding three years or to both the above penalties. There are increased penalties in the case of second or subsequent conviction in this case too.

The law on remedies for copyright infringement has been amended through the addition of Articles (Sections) 14B and 14C. These contain provisions for penalties, after conviction, on charges of criminal infringement of copyright. The implementing law changed the amount of the fines that can be sentenced in case of violation of copyright (for example, from CY 1500 pounds to CY 30000 pounds, from CY 2000 pounds to CY 35000 pounds etc. ) and the limits of the maximum time of imprisonment (for example, from imprisonment not exceeding two years to imprisonment not exceeding three years, from imprisonment not exceeding three years to imprisonment not exceeding four years, etc.). However, the remedies provided for either copyright infringement or acts infringing Article 6 and 7 been are the same and there aren't any new types of remedies introduced.

New provisions are introduced concerning the liability of intermediaries (in accordance with Article 8 (3) of the Directive). According to Article 13.4 of the copyright law as it has been amended by the implementing law, right holders may apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright.

## **G. Conclusion**

The limitations are in line with the Directive, albeit with minor variations. A problem may arise with respect to fair compensation claims.

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## VI CZECH REPUBLIC

The Czech Republic implemented the Directive in parts with the Law No. 131/2000 Coll. of 7 April 2000 on Copyright, Rights related to Copyright and on the Amendment of Certain Laws, which came in force on 1 December 2000 (Copyright Act 2000)<sup>186</sup>. As the Czech Republic had not fully implemented the Directive (in particular the provisions on technological measures) in 2005 the European Commission had taken action against the Czech Republic. The Commission has sent the Czech Republic 2005 a letter of formal notice asking for full information on its implementation of the Directive to open the first stage of infringement proceedings under Article 226 of the EC Treaty<sup>187</sup>. The proceedings were closed after the Czech Republic has announced that it will implement the full Directive soon.

### **A. Exclusive Rights**

Article 12 pp Copyright Act 2000 states the author's Economic Rights. Pursuant Article 12 paragraph 1 Copyright Act 2000 the author has the right to use his work and to grant by contact authorisation to another person to exercise this right.

The same right is provided for the performer concerning the performance (Article 71 Copyright Act 2000), the phonogram producer regarding his phonogram (Article 76 Copyright Act 2000), the producer of the audiovisual fixation concerning the audiovisual fixation (Article 80 Copyright Act 2000) and the broadcaster about his broadcast (Article 84 Copyright Act 2000).

#### **I. *Reproduction Right, Article 2 EUCD***

According to Article 12 paragraph 4a Copyright Act 2000 the author has the right to reproduction the work. Reproduction is defined in Article 13 Copyright Act 2000 as making of permanent or temporary, direct or indirect reproduction of the work, and that by any means and in any form, for the purpose of making the work available by means of such reproductions, Article 13 Copyright Act 2000. This definition adopts Article 2 almost literally.

The exclusive reproduction right is also provided for performers of their performances (Article 71 paragraph 2a Copyright Act 2000), for phonogram producers of their phonograms (Article 76 paragraph 2a Copyright Act 2000), for producers of the audiovisual fixation for the audiovisual fixation (Article 80 paragraph 2a Copyright Act

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<sup>186</sup> The Czech Copyright Act 2000 will be called Copyright Act 2000 in this Section.

<sup>187</sup> The text is available at

<<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/921&format=HTML&aged=0&language=DE&guiLanguage=en>>



2000) and for broadcasting organisations, of fixations of their broadcasts (Article 84 paragraph 2a Copyright Act 2000).

## **II.** *Communication to the public*

Pursuant to Article 12 paragraph 4e and f Copyright Act 2000 the author has the exclusive right to exhibit his work and to communicate it to the public.

Article 17 Copyright Act 2000 explains that the right of exhibition as given in Article 12 paragraph 4 Copyright Act 2000 means making the work available in a tangible form by the facilitation of the possibility to view or perceive in any other manner the original or reproduction. Exhibition shall not mean making the work available in accordance with Article 18 paragraph 2 Copyright Act 2000.

Article 18 pp Copyright Act 2000 define that communication of the work to the public shall mean making the work available in an intangible form, live or from a recording, by wire or wireless means. This includes making the work available in such a way that members of the public may access to the work from a place and at a time individually chosen by them. Article 18 paragraph 3 Copyright Act 2000 states that this shall not mean the mere operation of a facility enabling or facilitating such communication.

Article 19 Copyright Act 2000 gives a similar right with respect to the live performance of the work and its transmission, Article 20 Copyright Act 2000 in accordance with the performance of the work from a recording and its transmission, Article 21 Copyright Act 2000 with respect to broadcasting, Article 22 Copyright Act 2000 with respect to rebroadcasting and retransmitting of the broadcast and Article 23 Copyright Act 2000 in accordance to the performing of the broadcast.

An according right of communication to the public is provided for the performer (Article 71 paragraph 2g Copyright Act 2000), phonogram producer (Article 76 paragraph 2e Copyright Act 2000), film producer (Article 80 paragraph 2e Copyright Act 2000) and broadcasting organisations (Article 84 paragraph 2d Copyright Act 2000).

## **III.** *Distribution Right*

The author has pursuant to Article 12 paragraph 4b Copyright Act 2000 the right of distribution of his work. In accordance to Article 14 Copyright Act 2000 the right to distribute the original or copies of the work shall mean making the work available in a tangible form by sale or other transfer of property right to the original or to the copies of the work, including their offer for such purpose.

In difference to the Directive the Copyright Act 2000 does not use the expression “distribution to the public”. For that reason the provision seems to be broader.

Similar distribution rights are provided for the performer (Article 71 paragraph 2d Copyright Act 2000), phonogram producer (Article 76 paragraph 2b Copyright Act 2000), film producer (Article 80 paragraph 2 b Copyright Act 2000) and broadcaster (Article 84 paragraph 2c Copyright Act 2000).

Article 4 paragraph 2 EUCD has not been implemented in the Copyright Act 2000. Pursuant to Article 14 paragraph 2 Copyright Act 2000 the distribution right shall be exhausted with the first sale or other transfer of property right to the original or a copy of the work, by which the work is distributed lawfully on the territory of the Czech Republic. In difference to this regulation Article 4 paragraph 2 EUCD requires that the right is exhausted within the Community where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent.

## **B. Exceptions and Limitations, Article 5**

The Copyright Act 2000 provides several exceptions and limitations as mentioned in the Directive. Restrictions of copyright are, in general, provided for under Section 4 of the Copyright Act 2000.

Article 29 Copyright Act 2000 declares that the “three- step- test” (Article 5 paragraph 5 EUCD) applies to the restrictions on copyright.

### **I. *Transient Copying***

Article 5 paragraph 1 EUCD has been implemented by Article 37 paragraph 2a Copyright Act 2000. Thereafter copyright shall not be infringed by whoever makes, during the use of the work, a transient and incidental reproduction of the work in electronic form, which on its own has no economic significance, and the purpose of which is the facilitation of the use of the work, and whose making is an inseparable and indivisible part of the technological process of making the work available, including such reproduction which allows the effective functioning of the transmission system.

The wording of this provision is not very close to the Directive. Furthermore the implementation is wider than the Directive as the reproduction is not explicitly limited to temporary acts. Additionally Article 37 paragraph 2a Copyright Act 2000 only mentions the “use of the work” and does not restrict it explicitly to “lawful use” as the Directive does.

### **II. *Reprography and Private Copying***

Article 30 (1) Copyright Act 2000 establishes that personal uses do not constitute infringement. Accordingly, Article 30 (2a) Copyright Act 2000 asserts that copyright shall not be infringed by whoever for his personal use makes a recording, reproduction or

imitation of a work. However, a reproduction or imitation of a work of fine arts must be clearly labelled as such.

In difference to the Article 5 (2) (b) EUCD, Article 30 paragraph 2 Copyright Act 2000 does not state that this only applies to natural persons for private use and for ends that are neither directly or indirectly commercial. Instead, the Czech Act uses the broader expression “personal use”. This deviates from Article 5 (2) (b) in that a personal use potentially covers, for instance, research and other purposes which exceed a private use understood as a domestic use. Furthermore the connection between Article 30 paragraph 2a and b Copyright Act 2000 indicates that commercial uses are not excluded.

Article 30 paragraph 3 Copyright Act 2000 states that copyright shall not be infringed by whoever makes at the order of and for the personal use of the customer a print reproduction of the work on paper or other similar base using photographic technique or another procedure with similar effect, on condition that the work is not a published musical work or score. The effect is to permit document delivery for commercial purposes, provided it is made for personal use, but this is restricted to certain reprographic types of copying. Whether its might include, for instance, the scanning of a journal article for supply to third parties will depend on whether this constitutes a “photographic or similar” copying process. The question is open.

### **III. *Libraries, Archives, Cultural and Educational Establishments***

Pursuant to Article 37 paragraph 1 Copyright Act 2000 copyright shall not be infringed by a reproduction of works in a library, archive and other non commercial school, educational and cultural establishment for their archival and conservation purposes.

This implementation is broader than the Directive as it does not require “publicly accessible” libraries, educational establishments or museums. Furthermore the expression “cultural establishment” is wider than “museum”.

In accordance with the Directive Article 37 paragraph 1 Copyright Act 2000 specifies the permitted reproduction acts to such for archival or conservation purposes.

In addition, Article 35 Copyright Act 2000 provides two further exceptions for schools and educational establishments. Article 35 paragraph 2 Copyright Act 2000 states that copyright shall not be infringed by whoever utilizes a work for non commercial purposes during school performances performed exclusively by the pupils, students or teachers of the school or of educational establishment. This limitation can be subsumed under Article 5 paragraph 2c. In difference to the Directive the Copyright Act 2000 does not mention explicitly “publicly accessible”.

Article 35 paragraph 3 Copyright Act 2000 provides that copyright shall not be infringed by the school or school or educational establishment for uses for non commercial purposes for their own internal need a work created by a pupil or student as a part of their school or educational assignments ensuring from their legal relationship with the

school or school or educational establishment (school work). Again the Copyright Act 2000 does not mention that the establishment need be “publicly accessible”.

#### **IV. *Teaching and Scientific Purposes***

The Copyright Act 2000 provides in Article 31 b and 31 c and Article 35 paragraph 3 Copyright Act 2000 restrictions relating to Article 5 (3) (a) EUCD. Pursuant to Article 31 b Copyright Act 2000 Copyright shall not be infringed by whoever includes into his independent scientific, critical or technical work, or work designated for teaching purposes, for the clarification of its content, small published works in their entirety.

Article 31 c Copyright Act 2000 permits the use of a published work in a lecture exclusively for scientific, teaching or other instructive or educational purposes. In any case the author and the source have to be indicated.

Article 31 b Copyright Act 2000 is broader than Article 5 (3) (a) EUCD as it covers critical and technical works. However, the restrictions regarding quotations for the purpose of criticism are in accordance to Article 5 (3) (a) EUCD.

#### **V. *Disabled People***

Article 37 paragraph 2 c states that Copyright shall not be infringed by whoever for the benefit of people with a disability, makes a reproduction or has a reproduction made, non commercially, of a published work to the extent required by the specific disability.

#### **VI. *Reporting Current Events***

In accordance with Article 34 paragraph 1 b and c Copyright Act 2000 copyright shall not be infringed by whoever uses to a justifiable degree the work within the course of reporting on a current event during which such work is being performed, exhibited or otherwise used, or by anyone who borrows in the periodical press or other mass communication medium articles with a content of topical importance on political, economic or religious matters, which have already been published in another mass communication medium, or their translations. Such borrowing shall not be admissible if explicitly prohibited. If possible the author, the title of the work and the source must be indicated. There is no limitation to certain acts but the provision applies to all uses.

Article 34 paragraph 1c Copyright Act 2000 is narrower than the Directive as it only applies to periodical press or other mass communication medium Articles, which have already been published in another mass communication medium.

#### **VII. *Quotations***

As mentioned above, Article 31 b Copyright Act 2000 allows quotations for the purpose of criticism. There is no indication that the source must have been lawfully made available.

Article 31 a Copyright Act 2000, in addition, permits, to a justified degree, in an own individual work, excerpts from the published works of other authors.

### **VIII.** *Use for Official Purposes*

In accordance with Article 34 paragraph 1 a Copyright Act 2000, copyright shall not be infringed by whoever uses, to a justifiable degree, the work for official purposes in compliance with the law. This is broader than the Directive as it does not require the use for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

### **IX.** *Political Speeches*

Article 3 c Copyright Act 2000 exempts political speeches and addresses presented during official proceedings from copyright protection. This differs from the Directive. The Directive only allows the use of political speeches to the extent justified by the by the informatory purpose and requires the indication of the source.

### **X.** *Civil and Religious Ceremonies*

Pursuant Article 35 paragraph 1 Copyright Act 2000 copyright shall not be infringed by whoever utilizes a work for non commercial purpose during civil and religious ceremonies.

This regulation differs from the EUCD as the word “ceremonies” instead of “celebrations” is used. Moreover, the term “official celebrations” does not indicate public organisation.

### **XI.** *Works in Public Places*

Article 33 paragraph 1 Copyright Act 2000 states that Copyright shall not be infringed by whoever records or expresses by drawing, painting, graphic art, photography or film a work located on a square, in a street, in a park, on a public route or in any other public place. This additionally covers the reproduction, dissemination and communication to the public of the work recorded or expressed by such means. Three-dimensional reproductions are exempt..

In discrepancy to the EUC, Article 33 paragraph 1 does not explicitly require that the work is “permanently” located in a public place. More importantly perhaps, the provision exempts all work categories rather than works of architecture and sculpture.

### **XII.** *Inclusion of Works into Catalogues etc.*

Under Article 32 Copyright Act 2000 copyright shall not be infringed by whoever includes into a catalogue of an exhibition, auction, fair or other similar event organised

by him a picture of the work exhibited on such occasion. The author's consent is not required, in addition, for the utilization of the depiction of such work by reproduction and dissemination of the catalogue. If possible the source has to be indicated. The regulation does not require a "public" exhibition. In contrast Article 5 (3) (j) EUCD, Article 32 Copyright Act 2000 does not insist on the purpose of advertising or promotion of the event.

### **XIII. *Use for Demonstrations***

Article 30 paragraph 2 b Copyright Act 2000 states that copyright shall not be infringed by whoever, during the sale of the original or reproduction of works, of technical devices for their reproduction or for their communication to the public, of radio and television sets and computers, distributes or makes an temporary reproduction of the work within the scope necessary for the demonstration of the goods to a customer.

The exception use in connection with the repair of equipment has not been implemented.

### **XIV. *Other exceptions or limitations***

In addition, the Copyright Act 2000 provides further restrictions. Article 37 paragraph 2 b Copyright Act 2000 states that copyright shall not be infringed by whoever makes a reproduction of a photographic work which is his own portrait and which has been commissioned for a charge. Article 39 Copyright Act 2000 permits the owner of the original or reproduction of a work of fine arts, or of a photographic work, who exhibits such work or provides such work for exhibition free of charge, unless such use was excluded by the author during the transfer of ownership to such original or such reproduction of the work. Both concern analogue and minor uses in accordance with Article 5 (3) (o) EUCD.

## **C. Compensation System**

The Czech copyright system is based on both remuneration rights and a levy scheme.

The right to remuneration is established under Chapter 4. This Section entitles the right holder to remuneration on the resale of the original of a work of art (Article 24 Copyright Act 2000) and in connection with the reproduction of the work for personal use (Article 25 Copyright Act 2000).

Article 25 Copyright Act 2000 establishes a levy system. Following Article 25 paragraph 1 Copyright Act 2000 the author shall be entitled to a remuneration in connection with the reproduction of the work for personal use, in cases of works made public which can be reproduced for personal use on the basis of an audio or audio visual fixation, a broadcast, a print or other graphic expression by their transfer by means of a technical

device to empty records carriers, or by means of a technical device for making printed reproductions on paper or other similar base.

The person liable for this payment is, in accordance with Article 25 paragraph 2 Copyright Act 2000, the producer or importer of the technical device or empty carrier, the transporters or the forwarder or the provider of paid reproduction services.

Entitlement to remuneration arises at the time of the import or of the first sale (Article 25 paragraph 3 Copyright Act 2000). The right to remuneration pursuant to Article 25 paragraph 1 Copyright Act 2000 is subject to mandatory collective administration (Article 96 paragraph 1 Copyright Act 2000). The decision on the granting of an authorisation to execute collective administration is made by the Minister of Culture on the basis of a written application (Article 98 paragraph 1 Copyright Act 2000).

To provide assistance with the negotiation of collective agreements the parties of the agreement may use a mediator appointed for this purpose by the Ministry from the ranks of independent experts (Article 102 paragraph 1). The rules for the distribution of remuneration collected by the collective administrator are laid down in Article 104 Copyright Act 2000.

The tariffs of remuneration for the re-sale of an original of an artistic work or and tariffs relating to the reproduction of the work for personal use are state in the Annex to Law No. 121/2000 Coll.

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## **D. Protection of Technological Measures**

The relevant provisions of the EUCD have not been transposed. Following the ratification of the WCT and WPPT, Czechia implemented new prohibitions on dealings in circumvention devices under Article 43 Copyright Act.

This provides that copyright is infringed by whoever, for the purpose of achieving economic gain, develops, produces, offers for sale, rental or lending, imports, disseminates or utilizes, as a part of the provision of services or for any other purpose, aids designed for the removal, deactivation, or limitation of the function of technical devices or of other means applied for the protection of rights.

In addition, Article 43 (2) Copyright Act defines 'other means' as any procedure, product or component integrated into a procedure, device or product designed to avoid or prevent infringement of copyright to a work which is made available only by application of a code or of another method enabling decoding.

The provision departs from Article 6 (2) in a number of regards. First, it only covers situations in which an intent to achieve economic gain is present, which appears considerably narrower than the commercial purpose requirement under Article 6 (2).

EUCD. The difference lies in the fact that such intent must be proven additionally, whereas under Article 6 (2) the commercial nature of the acts mentioned immediately follows from the description of the acts<sup>188</sup>. Secondly, the clause makes no mention of services or advertise and promotion of circumvention tools.

## **E. Rights-Management Information**

Article 44 Copyright Act transposed the requirements on rights management information from the WCT and WPPT. Article 44 prohibits the removal or alteration of any electronic data identifying rights, the distribution of reproductions of the work, including their import, as well as communication to the public of works whose electronic data identifying the rights to the work have been removed or altered without the author's consent. Article 44 (2) provides that data identifying rights to a work pursuant to paragraph (1) shall mean data expressed in figures, codes or in any other manner, which by decision of the author accompany the work to identify the work and the rights relating to it.

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<sup>188</sup>See International Intellectual Property Alliance,  
<<http://www.iipa.com/rbc/2002/2002SPEC301CZECH.pdf>>.



## VII DENMARK

The Directive was implemented by Act no 1051 of 17 December 2002, which entered into force on 22 December 2002<sup>189</sup>. A proposal for implementation of the Directive was submitted for public hearing on 14 June 2002. When the hearing closed on 2 September 2002, 75 organisations, broadcasters, right holders, etc. had submitted comments on the proposal. These comments generally included a favourable view on the proposed implementation of the Directive, probably because Danish law was already in compliance with most of the Directive. However, the implementation did give rise to discussion on certain points, including

- whether *public performance* in Sections 2 (3) and 2 (4) of the DCA should include activities on the Internet;
- whether the limitation in Section 11 (3) of the DCA should apply to temporary reproductions under Section 11 a of the DCA;
- whether the scope of Section 12 of the DCA on reproductions for private use should be limited;
- Section 19 of the DCA on exhaustion of copyright (Danish law was previously based on a principle of international exhaustion, cf. below);
- whether it should be possible to further limit the scope of limitations on copyright in chapter 2 of the DCA by technological protection measures;
- whether Section 75 d of the DCA on technological protection measures should also cover reproductions for private use under Section 12 of the DCA, cf. below;

### A. Exclusive rights

Articles 2, 3 and 4 of the Directive have been implemented in Danish law as follows:

Article 2 has been implemented by Section 2 (2) of the DCA. Section 2 (2) defines the scope of protection for authors (of their works). Section 2 of the DCA also applies to the beneficiaries listed in Articles 2 (b)–2 (e) of the Directive, cf. Sections 65 (4), 66 (2), 67 (2) and 69 (3) of the DCA.

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<sup>189</sup> An English translation of the consolidated Danish Copyright Act currently in force (hereinafter referred to as the “DCA”) is available from the Danish Ministry of Culture at [www.kum.dk](http://www.kum.dk) (choose “English” and “Legislation and Statistics”).

*Article 3 (1)* has been implemented in Section 2, subsections 3 and 4, of the DCA. *Article 3 (2)* has been implemented by including references to Section 2, subsections 3 and 4, in Section 65 (4) (performers), Section 66 (2) (phonogram producers), Section 67 (2) (film producers) and Section 69 (3) (broadcasters). Section 2, subsections 3 and 4, therefore also apply to the beneficiaries listed in Article 3 (2) of the Directive.

*Article 4 (1)* has been implemented in Section 2 (3) (1) of the DCA.

*Article 4 (2)* has been implemented in Section 19 of the DCA. Prior to the implementation of the Directive, Denmark generally adhered to the principle of international exhaustion, cf. below.

## **I.    *Reproduction Right***

The beneficiaries of the Right of Reproduction are authors (of works), cf. Section 2 (2) of the DCA; performers (of fixations of their performances), cf. Section 65 (4) and 2 (2) of the DCA; phonogram producers (of their phonograms), cf. Section 66 (2) and 2 (2) of the DCA; film producers (of the original and copies of their films), cf. Section 67 (2) and 2 (2) of the DCA; and broadcasters (of fixations of their broadcasts), cf. Section 69 (3) and 2 (2). There are no divergences with respect to the Directive.

The question of temporary and ephemeral reproductions was previously subject to discussion in Danish copyright law. However, in the *travaux préparatoires* of an amendment to the Danish Copyright Act in 1998, it was emphasized that certain reproductions should not be recognised as infringements if they were transient and incidental reproductions constituting an integral part of a technical process and ancillary to the final result. Danish law was thus not in compliance with the Directive and the statutory text of the DCA was therefore changed, cf. Sections 2 (2) and 11a of the DCA.

## **II.   *Communication to the Public***

Non-simultaneous receptions of electronic communications were recognised under existing copyright law. Nevertheless, the wording of Section 2 of the DCA was changed to implement the *terminology* used in the Directive, cf. Sections 2 (3) (3) and 2 (4). According to the *travaux préparatoires*, this change shall not materially affect Danish Copyright law.

## **III. *Distribution Right***

A distribution right was in existence before implementation of the Directive. The principle of exhaustion of the distribution right is governed by Section 19 of the DCA.

Prior to implementation of the Directive, Danish law adhered to a principle of international exhaustion, i.e. the distribution right was exhausted upon the first distribution regardless of where this distribution had taken place. However, by

implementation of Directive 92/100/EEC on rental and lending rights a principle of regional exhaustion (similar to Article 5 (2) of the Directive) was introduced in Danish law as regards performers, phonogram producers, film producers, and broadcasters.

After implementation of the Directive, the distribution right is not exhausted within the Community, except where the first sale or other transfer of ownership in the Community of the work or copy in question is made by the right holder or with his consent, cf. Article 4 (2) of the Directive. However, the rental and lending rights are exhausted upon the first sale or other transfer of ownership by the right holder or with his consent *regardless* of where the sale/transfer has taken place (international exhaustion). This will inter alia ensure that Danish libraries can still lend out copyright protected items acquired outside the Community.

Under Danish law, the principle of exhaustion extends only to physical transactions. Danish law complies with recital 29 of the Directive.

Under Danish law, most of the limitations on copyright (including exhaustion of rights) are non-mandatory, i.e. license agreements may limit the scope of such limitations. However, such license terms and conditions must have been explicitly agreed upon. Unilateral limitation clauses will generally not be enforceable. Even if license terms and conditions limiting the scope of limitations of copyright have been agreed upon, any breach of such terms and conditions will generally constitute a breach of contract only, i.e. not a copyright infringement.

## **B. Exceptions and Limitations**

The three-step test in Article 5 (5) has not been implemented by an explicit provision in the DCA, neither has the similar three-step test in e.g. Article 9 (2) of the Berne Convention and Article 13 of the TRIPS Agreement been implemented by any explicit provision in the DCA.

Under Danish law, most of the limitations on copyright (including exhaustion of rights) are non-mandatory, i.e. license agreements may limit the scope of such limitations. However, such license terms and conditions must have been explicitly agreed upon. Unilateral limitation clauses will generally not be enforceable. Even if license terms and conditions limiting the scope of limitations of copyright have been agreed upon, any breach of such terms and conditions will generally constitute a breach of contract only, i.e. not a copyright infringement.

### **I. *Transient Copies***

Article 5 (1) of the Directive has been implemented as a copyright limitation in Section 11a of the DCA:

“11 a (1) It is permitted to make temporary copies

- i) which are transient or incidental;

- ii) which are an integral and essential part of a technical process;
- iii) the sole purpose of which is to enable a transmission of a work in a network between third parties by an intermediary, or a lawful use of a work; and
- iv) which have no independent economic significance.

(2) The provision of subsection (1) shall not apply to computer programs and databases.”

Before implementation of the Directive, certain temporary acts of reproduction were deemed to fall outside the scope of copyright protection. Danish law is now in compliance with the Directive.

## **II. *Reprography***

There is no express provision in Danish law corresponding to Article 5 (2) (a). Instead, photocopying within institutions, organisations, etc. are covered by extended collective licenses governed by Sections 50-52 of the DCA. Such extended collective licenses do not constitute copyright limitations, cf. recital 18 of the Directive.

## **III. *Private Copying***

Existing Danish law included a private use limitation, which widely corresponded to Article 5 (2) (b) of the Directive, cf. Section 12 of the DCA.

The reproduction right for private use under Section 12 of the DCA has been limited to natural persons since 1995. In connection with the implementation of the Directive, Section 12 of the DCA was further limited to *non-commercial* private use, cf. above. When technological measures become more common, the provisions on remuneration in Sections 39-46 of the DCA may be amended to reflect this, cf. Article 5 (2) (b) of the Directive.

## **IV. *Libraries, museums and archives***

Existing Danish law included limitations similar to Article 5 (2) (c) of the Directive, cf. Sections 16 and 33 of the DCA. To implement the Directive, Section 16 was limited to non-commercial use as set forth in the Directive.

## **V. *Broadcasters***

Existing Danish law included a limitation similar to Article 5 (2) (d) of the Directive, cf. Section 31 of the DCA. This provision was not amended in connection with the implementation of the Directive.

Under Section 31 (1) of the DCA, broadcasters may for the purpose of their broadcasts record works on tape, film, or any other device that can reproduce them provided they have the right to broadcast the works in question. The right to make such works available to the public shall be subject to the provisions otherwise in force.

The Minister for Culture may lay down rules on the conditions to make such recordings and on their use and storage, cf. Section 31 (2) of the DCA. According to the *travaux préparatoires* of an Act, which amended the DCA in 1995, the ephemeral recordings by broadcasters are today governed by agreements between right holders. Therefore, no specific rules have been laid down as prescribed in Section 31 (2) of the DCA.

## **VI. *Social Institutions***

Existing Danish law also included a limitation similar to Article 5 (2) (e) of the Directive, cf. Section 15 of the DCA. To implement the Directive, this provision was limited to reproductions for non-commercial purposes as set forth in the Directive.

Under Section 15 of the DCA, hospitals, nursing homes, prisons and other 24-hour institutions within the social and welfare sector, the prison service, and similar institutions may for the brief use of the inmates and others of the institution make recordings of works broadcast on radio and television if this is not done for commercial purposes. Such recordings may be used only within the institution in question.

The prejudice to the right holder following reproductions under Section 15 of the DCA was deemed to be minimal. Therefore, no remuneration scheme is in place as regards Section 15 of the DCA, cf. also recital 35 of the Directive.

## **VII. *Teaching and Scientific Research***

As regards indication of source, Section 11 (2) of the DCA prescribes that the source shall be indicated in accordance with the requirements of proper usage when a work is used in accordance with the provisions of chapter 2 of the DCA (Sections 11-51).

Existing Danish law included a number of limitations covered by Article 5 (3) (a), cf. Sections 13, 18, 21 and 23 (1):

Section 13 of the DCA governs reproduction within educational activities.

Subsections 1-3 of this provision are subject to the extended collective license governed by Sections 50-52 of the DCA, which is not deemed a limitation of copyright, cf. recital 18 of the Directive. These subsections were not amended in connection with implementation of the Directive.

Under Section 13 (4) of the DCA, teachers and students may as part of educational activities make recordings of their own performances of works if this is not done for commercial purposes. Such recordings may not be used for any other purposes. To

implement the Directive, this subsection was limited to non-commercial use only as set forth in the Directive.

Section 18 governs production of anthologies for educational use, etc. To implement the Directive, Section 18 was limited to non-commercial use, cf. Section 18 (2). The right holder is entitled to receive remuneration. If no agreement can be reached on the amount of the remuneration, each party may submit the question to the Copyright License Tribunal, cf. Section 47 of the DCA.

Section 21 governs public performances. Under Section 21 (1), a published work may *inter alia* be performed in public where the performance occurs in the case of educational activities. To implement the Directive, this subsection was limited to non-commercial use as set forth in the Directive, Section 21 (2) of the DCA.

Section 23 (1) governs use of works of fine art, etc. in critical or scientific presentations. To implement the Directive, Section 23 was limited to non-commercial use as set forth in the Directive. Commercial use of such works is governed by Section 23 (2) and subject to the extended collective license governed by Sections 50-52 of the DCA.

#### **VIII.** *Disabled People*

Existing Danish law included such limitation in Section 17. To implement the Directive, Section 17 was limited to non-commercial use.

#### **IX.** *Current economic, Political or Religious Topics*

Under Section 23 (3) of the DCA, works of art made available to the public may be used in newspapers and periodicals in connection with the reporting of current events in accordance with proper usage and to the extent required for the purpose. This provision does not apply to works produced with a view to use in newspapers or periodicals.

Under Section 23 (4) of the DCA, published works of art or copies of works of art that have been transferred to others by the author may be used in newspapers, periodicals, films and television if the use is of subordinate importance in the context in question.

These provisions were not amended in connection with the implementation of the Directive.

#### **X.** *Quotations*

Existing Danish law included a general quotation right, which was not amended in connection with the implementation of the Directive, cf. Section 22 of the DCA:

“A person may quote from a work which has been made public in accordance with proper usage and to the extent required for the purpose.”

**XI. *Public Security***

Existing Sections 26 and 28 of the DCA are covered by Article 5 (3) (e) of the Directive (Section 26 is also partly covered by Article 5 (3) (f), cf. below). Sections 26 and 28 were not amended during the implementation process.

**XII. *Speeches, Public Lectures etc.***

Existing Sections 26 and 32 of the DCA are covered by Article 5 (3) (f) of the Directive. Section 32 was not amended during the implementation process.

**XIII. *Religious or Official Celebrations***

Existing Section 21 of the DCA is partly covered by this provision of the Directive. The relevant part of Section 21 was not amended during the implementation process.

**XIV. *Architectural Works etc.***

Existing Section 24 (2) of the DCA is covered by this provision of the Directive. Section 24 (2) was not amended during the implementation process.

**XV. *Incidental Inclusion***

Existing Sections 23 (4) and 25 of the DCA are covered by this provision of the Directive. Sections 23 (4) and 25 were not amended during the implementation process.

**XVI. *Advertising for Public Exhibitions etc.***

Existing Section 24 (1) of the DCA is covered by this provision of the Directive. Section 24 (1) was not amended during the implementation process.

**XVII. *Caricature and Parody***

There is no explicit provision in the DCA corresponding to Article 5 (3) (k) of the Directive, and no such provision was introduced in connection with the implementation of the Directive. Under Danish law, caricatures, parodies and pastiches will, however, often be deemed new and independent works of art under Section 4 (2) of the DCA and thus fall outside the scope of copyright protection.

**XVIII. *Artistic Works***

Section 24 (3) of the DCA was found to be in compliance with this provision of the Directive, and was not amended during the implementation process.

### **XIX. *Research or Private Study***

Section 21 (3) of the DCA was generally found to be in compliance with the Directive, and the scope of this provision was actually expanded in connection with the implementation of the Directive.

Under Section 21 (3), works which have been made public may be made available in public libraries to individuals for personal viewing or study on the spot by means of technical equipment.

### **XX. *Uses of 'minor importance'***

Section 18 (3) of the DCA was upheld with reference to this provision of the Directive. Under Section 18 (3), a few published songs may be freely used in song booklets produced solely for the use of participants in a particular meeting. However, no more than 300 copies of each booklet may be produced.

## **C. Compensation system**

Under Section 39 (1) of the DCA, anyone who for commercial purposes produces or imports sound tapes or videotapes or other devices on to which sound or images can be recorded shall pay remuneration to the authors of the works mentioned in Section 39 (2).

Under Section 39 (2), the remuneration shall be paid for tapes, etc., which are suitable for production of copies for private use, and only for works which have been broadcast on radio or television, or which have been published on phonogram, film, videogram, etc.

The organisation responsible for collection of the compensation is "COPY-DAN Båndkopi". According to Section 39 (3), administration and control, including collection, shall be carried out by a joint organisation representing a substantial number of authors, performers and other right holders, including record producers, etc., and photographers, whose works, performances, etc., are used in Denmark. Furthermore, the organisation shall be approved by the Minister for Culture. "COPY-DAN Båndkopi" has been approved according to this provision.

Further reference is made to Sections 39-46 of the DCA. Sections 39-46 of the DCA were not amended in connection with the implementation of the Directive. However, the amount of remuneration set forth in Section 40 of the DCA is currently subject to political discussions in Denmark, which may result in lower remuneration per CD, DVD etc. in the near future.



## D. Protection of Technological Measures

Article 6 (1) has been implemented in Danish law by Section 75 c (1) of the DCA: “It is not permitted to circumvent effective technological measures without the consent of the right holder.”

Anyone who with intent or by negligence violates Section 75 c will be liable in damages under general Danish principles of tort law. Furthermore, anyone who with intent or by gross negligence violates section 75 c is liable to a fine, cf. Section 78 of the DCA.

### I. *The definition of ‘effective’ technological measures*

Under Section 75 c (4) of the DCA, the expression effective technological measures in subsections (1) and (2) shall mean “any effective technological measures that, in the normal course of their operation, are designed to protect works and performances and productions, etc. protected under the Act”. It is emphasized in the *travaux préparatoires* that this provision should be interpreted in correspondence with Article 6 (3) of the Directive.

According to the *travaux préparatoires*, measures designed to prevent or impede the personal use of a work acquired through purchase or the like, such as the regional encoding of DVDs, are not covered by the term “effective technological measures”.

### II. *Acts of circumvention*

Please see the above comments on Section 75 c (1) of the DCA.

### III. *Acts dealing in anti circumvention devices*

Article 6 (2) of the Directive has been implemented in Danish law by Section 75 c, subsections (2) and (3) of the DCA: “ (2) It is not permitted to produce, import, distribute, sell, rent, advertise for sale or rental, or to possess for commercial purposes devices, products or components that are promoted, advertised or marketed for the purpose of circumvention of effective technological measures; have only a limited commercially significant purpose or use other than to circumvent effective technological measures; or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures. This applies likewise to services.

### IV. *Limitations and technological protection measures (Article 6 (4))*

Article 6 (4) of the Directive has been implemented in Danish law by Section 75 d of the DCA. The limitations covered by this provision are:

- DCA Section 15 on reproduction by hospitals, etc. of works broadcasted on radio and television

- DCA Section 16(1) on reproduction within archives, libraries and museums
- DCA Section 17(1)-(4) on reproduction and distribution for visually disabled and hearing-impaired persons
- DCA Section 18(1)-(2) on reproduction of anthologies for educational use
- DCA Section 21(1)(ii) on public performance in connection with educational activities
- DCA Section 23(1) on use of works in critical or scientific presentations
- DCA Section 26 on reproduction of proceedings in Parliament, etc.
- DCA Section 27 on access to public documents
- DCA Section 28 on use of works in connection with judicial proceedings, proceedings before administrative tribunals, etc.
- DCA Section 31 on reproduction of works by broadcasters
- DCA Section 33 on recordings of broadcasts and storage of such recordings in the Danish National Media Collection
- DCA Section 68 on remuneration for use of sound recordings in broadcasts on radio and television, etc.

Notably, Section 12 of the DCA on reproductions for private use is not covered by Section 75 d.

Under Section 75 d of the DCA, the Danish Copyright License Tribunal may, upon request, order a right holder who has used effective technological measures to make such means available to a user which are necessary for the latter to benefit from the above-mentioned limitations of copyright. If the right holder does not comply with the order within 4 weeks from the decision of the Tribunal, the user may circumvent the effective technological measure, notwithstanding the provision of section 75 c (1).

The right to circumvent an effective technological measure applies only if the user has legal access to the work, the performance, the production, etc., cf. section 75 d (1), and to the extent that the right holder has not, by voluntary measures, including agreements with other parties concerned, ensured that the user may benefit from the limitations of copyright notwithstanding the use of effective technological measures, cf. Section 75 d (2). Furthermore, under Section 75 d (3) the right to circumvent an effective technological measure does not apply to works and performances or productions, etc. made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them, cf. the second division of section 2 (4) (i).

The Danish Copyright License Tribunal is an independent expert authority set up by the Ministry of Culture, cf. Section 47 of the DCA. The tribunal is regulated by ministerial order no. 25 of 14 January 2004.

The public hearing on the proposal for implementation of the Directive resulted in several comments from right holders, broadcasters and organisations. The right holders generally welcomed the proposal and emphasized the importance of not including Section 12 of the DCA on private copying among the limitations covered by Section 75 d. Some broadcasters and organisations found the proposal too complicated and inadequate with respect to their use of works under the limitations covered by Section 75 d.

Under Danish law, most of the limitations on copyright are non-mandatory, i.e. license agreements may limit the scope of such limitations. However, such license terms and conditions must have been explicitly agreed upon. Unilateral limitation clauses will generally not be enforceable.

Even if license terms and conditions limiting the scope of limitations of copyright have been agreed upon, any breach of such terms and conditions will generally constitute a breach of contract only.

As stated above, license terms and conditions limiting the scope of limitations of copyright are enforceable only if they have been explicitly agreed upon. If a work is protected by technological protection measures which *de facto* curtail the rights of the purchaser, this may constitute a breach of contract. For instance, this will be the case if a consumer cannot play a CD or watch a DVD because of technological protection measures. In such case, the consumer is allowed to circumvent the technological protection measures to be able to play the CD and watch the DVD, cf. above on Section 75 d.

In other cases, technological protection measures may not prevent normal use of the work (e.g. playing a CD or watching a DVD), but only *copying* of such work. Generally, such anti-copying device will not constitute a breach of contract, even though the buyer may not be able to make private copies of the work as set forth in Section 12 of the DCA. The buyer is generally not allowed to circumvent such anti-copying device, cf. Section 75 d (described above).

## **E. RIGHTS MANAGEMENT INFORMATION**

Article 7 of the Directive has been implemented by Section 75 e of the DCA:

“75 e (1) It is not permitted without the consent of the right holder to

- (i) remove or alter any electronic rights-management information; or

- (ii) distribute, import for distribution or communicate to the public works and performances or productions, etc. from which electronic rights-management information has been removed or altered without consent.

(2) The provision of subsection (1) shall apply only if the actions concerned are carried out by a person who knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of the right to a work or performance or production, etc. protected under this Act.”

Anyone who with intent or by negligence violates section 75 e will be liable for damages under general Danish principles of tort law. Furthermore, anyone who with intent violates section 75 e is liable to a fine, cf. Section 78 of the DCA.

## **F. Sanctions**

Please see the above comments on Section 78 on criminal liability for violation of the provisions on technological protection measures. Apart from this provision, no *new* sanctions were introduced in Danish copyright law in connection with implementation of the Directive.

However, existing civil sanctions may also apply. These include criminal sanctions, cf. Sections 76-82 of the DCA and certain provisions of the Danish Criminal Code; liability in damages and other kinds of compensation, cf. Section 83 of the DCA and general principles of Danish tort law; seizure, etc. of infringing copies, cf. Section 84 of the DCA. Furthermore, injunctive relief may be available under the Danish Administration of Justice Act.

Except for Section 78 of the DCA, no new remedies have been introduced or amended following implementation of the Directive.

Intermediaries may become liable under Danish tort law, criminal law, etc. However, liability for mere conduit, caching and hosting is excluded or limited under Sections 14-16 of the Danish Ecommerce Act, which implement Articles 12-14 of the Ecommerce Directive.

## **G. CONCLUSION**

There are no obvious disparities between Danish law and the Directive, and the Directive is generally believed to have been implemented correctly in Denmark.

## VIII ESTONIA

Estonia implemented the Directive by amending the Copyright Act of 11 November 1992 (RT2 1992, 49, 615, consolidated text RT I 2000, 16, 109) with the Act of 22 September 2004 (RT I 1999, 54, 580) which came in force 29 October 2004<sup>190</sup>. The main areas of implementation concerned the introduction of certain exceptions and limitations. Most existing limitations were left unaffected. The implementing instrument also concerns the introduction of provisions on Rights Management Information.

### A. Exclusive Rights

The economic rights of authors and owners of related rights have not been affected by the transposition. The right of making available and communication to the public already formed part of the Copyright Act following the 1999 amendments.

#### I. *Reproduction Right, Article 2 EUCD*

The author has the exclusive right to authorise or prohibit the reproduction of the work, Section 13 subsection 1 clause 1 Copyright Act 2004.

According to Section 13 subsection 1 clause 1 Copyright Act 2004 reproduction means the making of one or several temporary or permanent copies of the work or a part thereof directly or indirectly in any form or by any means.

Corresponding rights are granted to performers (Section 67 subsection 2 clause 5 Copyright Act 2004), producers of phonograms (Section 70 subsection 1 clause 1 Copyright Act 2004), broadcasting organisations (Section 73 subsection 1 clause 3 Copyright Act 2004) and film producers (Section 73<sup>1</sup> subsection 1 clause 2 Copyright Act 2004).

#### II. *Communication to the Public*

According to Section 13 subsection 2 clause 9 Copyright Act 2004, the author has the exclusive right to authorise or prohibit the communication of the work by radio, television or satellite, and retransmission thereof by cable network, or direction of the work to the public by other technical devices, except in the manner specified in clause 9<sup>1</sup> of this Section (right of communication of the work).

Section 13 subsection 2 clause 9<sup>1</sup> Copyright Act 2004 now gives the author the exclusive right to authorise or prohibit the making available to the public in such a way that

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<sup>190</sup> English Version: <http://www.legaltext.ee/text/en/X40022K6.htm>. Estonian version under <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=040970022&login=proov&password=&system=ems&server=ragne1>.

persons may access the work from a place and at a time individually chosen by them (right of making the work available to the public), which corresponds with Article 3 EUCD.

Similar rights are provided for the performer (Section 67 subsection 2 clause 3<sup>1</sup> Copyright Act 2004), the producer of phonograms (Section 70 subsection 1 clause 5 Copyright Act 2004), for broadcasting organisations (Section 73 subsection 1 clause 4<sup>1</sup> Copyright Act 2004) and film producers (Section 73<sup>1</sup> subsection 1 clause 4 Copyright Act 2004).

### **III. *Distribution Right, Article 4 EUCD***

Pursuant to Section 13 subsection 2 clause 4 Copyright Act 2004, the author has the exclusive right to authorise or prohibit the distribution of the authors work's or copies thereof.

Distribution means the transfer of the right of ownership or copies thereof or any other form of distribution to the public, including the rental and lending, except for the rental and lending of works of architecture and works of applied art, Section 13 subsection 1 clause 2 Copyright Act 2004

Similar rights are provided for the performer (Section 67 subsection 2 clause 6 Copyright Act 2004), the producer of phonograms (Section 70 subsection 1 clause 3 Copyright Act 2004), for broadcasting organisations (Section 73 subsection 1 clause 5 Copyright Act 2004) and film producers (Section 73<sup>1</sup> subsection 1 clause 2 Copyright Act 2004).

The first sale or transfer in some other manner of the right of ownership of a copy of a work by the author or with his or her consent in a Member State of the EU or a state which is a contracting party to the EEA Agreement shall exhaust the right specified in this clause.

A rental and lending right is contained in Section 13 subsection 1 recital 1 Copyright Act 2004.

## **B. Exceptions and Limitations, Article 5**

The Estonian Copyright Act provides for a series of already existing limitations which have not been altered following the transposition of the Directive and which, specifically in connection with technological measures control potentially cause frictions with the harmonisation standard under the Directive. As noted, the act implements few of the non-mandatory limitations under Article 5.

Chapter IV Copyright Act 2004 contains relevant limitations on the exercise of economic rights of authors (free use of works). The three step test (Article 5 (5) EUCD) is literally implemented in Section 17 Copyright Act 2004. According to Section 17, the use (not: reproduction) of a work without the authorisation of its author and without payment of remuneration is permitted only in those cases directly prescribed in Sections

18 – 25 Copyright Act 2004, if this does not conflict with the normal exploitation of the work or does not unreasonably prejudice the legitimate interests of the author. The function of Sec. 17 appears ambiguous in the sense that it refers to those limitations enumerated only. This can either be construed so as to indicate a general compatibility of all limitations with the three step test, in which case the second and third requirements of Article 5(5) EUCD need not be proven, or may be construed as a general safety net immediately and additionally applicable to a restrictive interpretation of existing limitations.

Corresponding limitations are laid down in Section 75 Copyright Act 2004 in relation to related rights. Sec. 19 provides for a number of limitations with regard to scientific, informational, judicial and administrative purposes.

The transposing instrument introduces a new Sec. 19 (3-1), which was inserted in order to implement Article 5(3)(c) EUCD. Most of the remaining have limitations been left unchanged, though minor amendments have been made in some cases.

Sec. 19 Copyright Act then contains an extensive list of limitations for free reproduction of works for scientific, educational, informational, judicial and administrative purposes permitted without the authorisation of the author, and without payment of remuneration, if reference is made to the author of the work, if it appears thereon, the title (name) of the work and the source publication.

## **I. *Transient Copies***

Section 18 (1) Copyright Act 2004 implements Article 5 (1) EUCD. Sec. 18 (1) Copyright Act is transposed as a limitation of the reproduction right.

The provision permits temporary and casual reproductions of the work which occur as an integral and essential part of a technical process, the purpose of which is to mediate the communication of the work in the network between third parties or to enable the lawful use of the work or an object of related rights which has no independent commercial purpose.

The text slightly deviates from the Directive. First, in its first alternative sec. 18(1) Copyright Act only refers to copyrighted works. Sec. 75, which, by way of analogy applies to limitations of related rights, extends the limitation to all related rights by way of reference (Sec. 75(6) Copyright Act).

Secondly, in contrast to the Directive, the purpose must be to mediate the communication of the work, which is slightly wider than the wording used in Article 5(1) EUCD which is based upon facilitating an effective transmission. Arguably, this only concerns those transient copies which fulfil the purpose of enhancing the speed of a transmission, that is, (generally) ephemeral copies generated on proxy servers. The current wording exempts all types of transient reproductions which “mediate” the transmission, and this may include any temporary copy that is made in the memory of a

computer receiving the transmission. One example of how this extends the scope of Article 5(1) is the transmission of protected works as Email attachment in intranet networks. Such copies would arguably be caught by Article 5 (1) because the purpose of the copy made on the receiving machine would not be to speed up the transmission but to make the work accessible and visible on screen.

In its second alternative, Sec. 18, in accordance with Article 5(1) EUCD, permits lawful uses to be exempt. The Copyright Act does not expressly demarcate the meaning of a lawful use. The term “unlawful use”, by contrast, is used in relation to civil sanctions (Sec. 81(4) Copyright Act) from which it follows that an unlawful use is a use infringing exclusive rights only. It follows that the term “lawful use” refers to any use which is either licensed, authorised by way of implied consent or one which is permitted under any applicable exception. However, given that there is no clear explanation provided, the types and scope of lawful uses under Sec. 18 Copyright Act remain subject to future judicial assessment.

The provision also deviates from Article 5(1) in terms of the implied three step test as used in the Directive, according to which the transient reproduction must not have own economic significance. Sec. 17 Copyright Act substitutes this with the phrase “independent commercial purpose”.

Sec. 18(1) does not extend to computer programs nor to the database maker right, though it extends to databases protected by copyright.

## **II. Reprography**

Article 5(2)(a) of the Directive has been implemented by amending Sec. 18 Copyright Act.

Sec. 18(1) sets forth general limitations on the “free private use of works”. As the usage of the term “free” might indicate, the perception of Estonian copyright law appears very close to granting a general positive right to make certain copies, though the private copying exception is subject to a number of restrictions.

Sec. 18 (3)(1) implements Article 5(2)(a) and no deviances can be ascertained. Reprography now is subject to compensation in accordance with Sec. 27(1) Copyright Act (see below).

## **III. Private Copying**

Article 5(2)(b) on private reproductions has been implemented by amending Sec. 18. Sec. 18 (1) permits the reproduction of a lawfully published work by a natural person for private use without authorisation and without payment of remuneration. Such reproduction must not be carried out for any commercial purposes. The latter restriction was inserted following the transposition of the Directive, whereas a general right of private copying already existed under the 1999 Act. The provision does not apply to works of architecture such as buildings or other similar constructions; works of visual art



and limited editions; and electronic databases. The making of private copies of computer programs is limited to Secs. 24 and 25 (lawful use and decompilation).

Sec. 18 (1) para. 5) introduces further restrictions based upon Article 5(2)(a) and (b). In relation to other works, the private copying exception is subject to further scrutiny under the three step test. Permitted reproductions must not be made for commercial purposes and by natural persons as required under Article 5(2)(b).

A positive right to claim remuneration is only provided with respect to private copies made in case of audiovisual works and sound recording thereof (i.e. not in relation to other sound recordings). Private copying is permitted but subject to copies being made for private use (research or private study) and subject to compensation. A levy scheme is in place under Sec. 27 (see below).

#### **IV. *Archives, Public Libraries, Public Museums (Article 5 (2) (c)***

Section 20 Copyright Act 2004 allows the making of a single copy of a work included in the funds or collection of archives, a public library or a public museum in order to:

- replace a work or a copy thereof which has been lost, destroyed or rendered unusable or, in the likelihood of such danger, make a copy to ensure the preservation of the work. There is a likelihood of danger if a work or a copy thereof is the single one in a library, archives or a museum and the termination of its lending or display is contrary to the functions under the Articles of association of the library, archives or museum or
- replace a work or a copy thereof which belonged to the permanent collection of another library, archives or museum if the work is lost, destroyed or rendered unusable.

However, the activities of the library, archives or museum concerned must not be carried out for any commercial purposes and the acquisition of another copy of the work is impossible. Besides, libraries, archives and museums have the right to reproduce works or parts thereof which belong to their funds or collections on orders from natural persons for private use (Section 18 subsection 1 Copyright Act 2004) or on orders from a court or a state agency for the purposes prescribed in Section 19 subsection 8 Copyright Act 2004 of this Act. In both cases the activity prescribed shall not be carried out for commercial purposes.

#### **V. *Broadcasters***

A broadcasting organisation may make ephemeral recordings of works which it has the right to broadcast on the condition that such recordings are made by means of its own facilities and used for its own broadcasts, Section 23 subsection 1 Copyright Act 2004.

These recordings shall not be destroyed if they have considerable value in terms of cultural history. In such case, the recordings shall be preserved, without the authorisation

of the author, in the archives of the broadcasting organisation as works of solely documentary character. The works to be preserved in the archives shall be decided by the broadcasting organisation or, in the case of a dispute, by the State Archivist, Section 23 subsection 3 Copyright Act 2004. This slightly deviates from the Directive, which prescribes that an archive should be ‘official’.

## **VI. *Teaching and Scientific Research***

The implementing instrument has not changed the existing provisions relating to limitations for teaching and scientific research.

In accordance with the Directive, Section 19 subsection 2 Copyright Act 2004 already permitted to use a lawfully published work without the author’s authorisation, and against payment of remuneration if the author, the title and the source are indicated for the purpose of illustration for teaching or scientific research, to the extent justified by the purpose, and on condition that such use is not carried out for commercial purposes.

In addition, Section 19 subsection 3 Copyright Act 2004 allows the *reprographic* reproduction of articles lawfully published in newspapers, journals or other periodicals and of excerpts from published works for the sole purpose of teaching or scientific research in educational and research institutions whose activities are not carried out for commercial purposes. The author, title and the source have to be indicated.

Section 22 Copyright Act 2004 permits the public performance of works in the immediate teaching process in educational institutions by teaching staff and students, if the author and the work are indicated and the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc.) who are directly connected with the educational institution where the work is performed. In contrast to the Directive, however, a non-commercial purpose is not explicitly required.

## **VII. *Disabled People***

Section 19 subsection 9 Copyright Act 2004 contains a limitation concerning the free reproduction and distribution of works made available to the public in Braille or another technical manner for the blind (except works created especially for the blind to be reproduced in such manner), on condition that such use is not carried out for commercial purposes. The provision was unaffected and does not implement Article 5(3)(b). The source has to be indicated. This differs from the Directive as it only allows the free use for the blind. Moreover, it does not limit the use to the extent required by the disability.

## **VIII. *Reporting Current Events (5-3-c EUCD)***

As noted, the implementing instrument has not significantly modified the existing limitations. The Act contains extensive limitations related to the press and reporting currents.

Sec. 19(1) Copyright Act permits the making of summaries and quotations from works which have already been lawfully made available to the public, provided that the idea of the work as a whole which is being summarised or quoted is conveyed accurately, and their extent does not exceed that justified by the purpose. This includes summaries of and quotations from newspaper articles and journals for providing an overview of the press.

The provision mirrors, to a certain extent, Article 5(3)(d) EUCD. In comparison to Article 5(3)(c) EUCD, however, the provision does not indicate a restriction to specific purposes of criticism or review. The extension to “summaries” likewise introduces an element that might prove to substantially extend the scope of the limitation. However, Article 19(3) refers to summaries as texts relying upon an existing work by referring to ‘ideas’ being conveyed, a scenario unlikely to be subject to copyright infringement as such. In relation to Article 5(3)(c) however, compatibility with the Directive is doubtful since it expressly refers to the purpose of criticism or review which is absent in Section 19 (1) Copyright Act. Sec. 19 (1) therefore goes beyond the scope of the Directive in permitting the making of quotations for virtually any purpose, rather than being restricted to current economic, political or religious topics. In addition, Section 19 (1) does not make it a condition that the use may be reserved.

Section 19 subsection 3 (1) Copyright Act 2004 permits the reproduction and distribution in the press of articles previously published in newspapers, journals and periodicals on current economic, political or religious topics. It also permits the communication of radio or television broadcasts of the same character by radio, television or satellite or retransmission via cable networks, except if the author of the work or copyright holder has expressly retained the right of such reproduction or communication. It is noteworthy that the limitation does not apply in relation to acts of making available (the types of communications set forth are restricted to traditional television and radio uses).

Furthermore Section 19 (3) (2) Copyright Act 2004 allows, for the purpose of reporting current events, the partial reproduction and *directing at the public* of literary and artistic works ‘seen or heard’ in the course of the event, by means of radio, television, photography, cinematography or satellite, or their retransmission via cable network, but in the form and to the extent required by the purpose of reporting current events. Under the provision, it is not necessarily required that the limitation applies in relation to information purposes and/or to the extent that the current events in questions have a certain quality as regards the public interest. It should be noted that the provision, in contrast to Section 19(2)(1) is not subject to consent by the right holder. This deviates from the Directive which requires an information purpose. In both cases the source has to be indicated.

## IX. *Quotation*

Section 19 subsection 1 Copyright Act 2004 permits making summaries of and quotations from works which have already been lawfully made available to the public,

provided that the idea of the work as a whole which is being summarised or quoted is conveyed correctly, and their extent does not exceed that justified by the purpose, including summaries of and quotations from newspaper Articles and journals for the purpose of providing an overview of the press. The authors name, the title and the source have to be indicated.

Section 19 subsection 7 Copyright Act 2004 permits, for the purpose of communicating information regarding current events, the use of extracts of public speeches, addresses, sermons, speeches delivered in the course of legal proceedings, and other oral works in the press, by means of cinematography, radio, television or cable network and to the extent required by the purpose of communicating such information. Speeches of political content may be used in their entirety under the specified conditions. The right of publication of collections of works performed in public specified in this clause belongs to the author. The source has to be indicated.

#### **X. *Judicial and Administrative Purposes***

Section 19 subsection 8 Copyright Act 2004, in accordance with Article 5(3)(e) EUCD, permits the reproduction of a work for the purposes of a judicial or administrative procedure or for the purposes of public security and to the extent justified by the purposes of a judicial or administrative procedure or insurance of public security. The source has to be indicated. The provision differs insofar as it does not mention parliamentary proceedings, states an explicit limit of the use and requires the indication of the source.

#### **XI. *Public Libraries, Museums and Archives (Article 5 (3) (n) EUCD)***

Public libraries, public museums and archives may make the works or objects of related rights in their collections available through special equipment located within their territory on orders from natural persons for study or scientific purposes, Section 20 subsection 3 Copyright Act 2004.

### **C. Compensation system**

According to Section 14 subsection 1 the author has the right to obtain remuneration (author's remuneration) for the use of the author's work by other persons except in cases prescribed by the Copyright Act 2004.

Section 18 pp Copyright Act 2004 provides that the use of works is free without charge unless otherwise prescribed.

Authors, as well as performers and producers of phonograms, are remunerated for the private use of works under a levy scheme. This is payable by manufacturers, importers and sellers of recording devices (audio tape recorders, video tape recorders, etc.) and blank audiovisual recording media (tapes, cassettes, etc.) as well as by who transport the devices and media specified from a state which belongs to the Community into Estonia, Section 27 subsection 1 Copyright Act 2004.

The Minister of Culture shall annually determine the amount of the remuneration and the collective management organisations representing authors, Section 27 subsection 3 Copyright Act 2004.

Furthermore, authors and publishers are entitled to obtain equitable remuneration for the reprographic reproduction (photocopying or reproduction by any other analogous method on paper or on any other similar medium) of their works, Section 13 subsection 1 clause 1 Copyright Act 2004. The amount of the remuneration shall be determined on the basis of the volume of the work, the number of copies made and the price of one sheet copied. Authors and publishers are entitled to obtain equitable remuneration for the reprographic reproduction (photocopying or reproduction by any other analogous method on paper or on any other similar medium) of their works (clause 13 (1) 1)). This remuneration shall be paid by persons who make copies of literary, artistic and scientific works protected by this Act (equipment operators), Section 27<sup>1</sup> subsection 2 Copyright Act 2004.

## **D. Protection of Technological Measures**

The Act transposed Article 6 in a new section on “technological measures” under Sec. 80(3) Copyright Act. Article 6 (2) EUCD was not, as such, transposed. Specific criminal provisions apply.

Technological measures are defined in Sec. 80(3)(2). The definition refers to any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts related to a work, an object of related rights or a database within the meaning of Chapter VIII<sup>1</sup> of the Act and for which the holder of copyright, the holder of related rights or the maker of the database has not granted the authorisation.

The Copyright Act 2004 does not explicitly define the term “effective”. However, in Section 80 subsection 3 Copyright Act 2004 the act refers to measures with the help of which the right holders can control the use of a work or objects of related rights through the application of an access control or protection process which achieves the protection objective (such as encryption, scrambling or other transformation or a copy control mechanism). This description corresponds with the definition of “effective” given in the Directive. The Act, thereby, also makes it clear that technological measures encompass both access and copy control mechanisms.

### **I. *Prohibition against Circumvention***

According to Sec. 80 (3)(1) Copyright Act, authors and holders of related rights may, in order to protect their rights, add technological measures to a work or object of related rights. In addition, criminal provisions apply with respect to the possession and use of circumvention devices.

It is noteworthy that the legislator has chosen to go beyond the legal protection of technological measures but has created, apparently, a type of positive right to make use of technological measures in order to protect works and other subject matter. The Act is, however, silent on the exact legal nature of such right. It neither expressly defines the right to add such measures as a type of exclusive right nor, adversely, refers to the legal nature of acts of circumvention as acts violating copyright.

## **II. *Commercial Dealings in Circumvention Devices***

The Act did not implement Article 6(2) EUCD. Thereby, dealings in anti circumvention technologies are not prohibited under the Copyright Act.

A specific provision mirroring Article 6 (2)EUCD is contained in Article 225 of the Criminal Code, which penalises the manufacture, acquisition, possession, use, delivery, sale or transfer of a technical device or equipment designed for removal of protective measures against illegal reproduction of works or illegal reception of signals transmitted via satellite or cable. The act is punishable by a pecuniary punishment or up to 3 years imprisonment. It should be noted that the provision only refers to removal, not circumvention. The provision provides an increase of fines if the act was committed by a legal person.

This results in a different liability system. If technological measures are circumvented resulting in copyright infringement, civil liability is incurred as a consequence of unlawful use of the copyrighted work, not as a consequence of circumvention. Criminal liability is incurred by using circumvention devices resulting in an illegal reproduction. Thereby, the Estonian implementation only applies once an actual act of copyright infringement can be proven rather than for the sheer act of accessing protected material. This position has severe effects upon the compatibility of Estonian law with the obligation to provide protection against dealings in anti circumvention technologies. Therefore, the scope of the criminal provision is unclear.

The Act therefore does not provide legal redress in case a technological protection is circumvented without resulting in copyright infringement. In turn, there are doubts as to when such infringement can be ascertained. Under the EUCD, reproductions cover transient copies made in RAM. The definition of the Estonian Act on reproductions merely refers to certain digital techniques but makes no provision for short lived reproductions. And whereas Article 5(1) has been implemented as a limitation on transient and ephemeral copying, allowing the conclusion that transient copies are initially caught under the reproduction right, the status of copies not covered under Article 5 (1) EUCD (such as copies made in RAM by running a computer program or copies eventually generated on screen) is unclear because Article 5(1) is intended to cover copies made in networks only.

### **III. *Limitations and Technological Protection Measures***

Sec. 80(3)(4) implements Article 6(4) EUCD. The provision contains an obligation of right holders to adjust measures in order to allow “entitled persons” to freely use the work etc. to the extent necessary for the use as prescribed in the relevant provisions dealing with limitations.

The obligations only refer to the limitations under Sec. 18 cl. 19 no. 2, 3, 8 and 9 and Section 20 and 23. Correspondingly, the same limitations apply with respect to holders of related rights under Sec. 75 (1) 1, 2, 5 and 6.

Failure to comply with a reasonable request of entitled persons gives beneficiaries an opportunity to refer the matter to a specific procedure before the Copyright Committee which has jurisdiction in accordance with Sec. 87 of the Act. It should be noted that such jurisdiction is exclusive and judicial proceedings can only be brought after the failure of the procedure before the Copyright Committee.

Sec. 80(3)(5) implements Art. 6(4)(4) EUCD. Accordingly, beneficiaries cannot rely on Sec. 80(3)(4) in cases where works and objects of related rights have been made available to the public on the basis of an agreement in such a way that persons can use them from a place and at a time individually chosen by them.

In addition, the Estonian implementation asserts that protected computer programs are not covered (Sec. 80(1)(6)). Databases, on the other hand, are covered under Sec. 80(1) though it must be stressed that, again, Sec. 80(1) merely covers acts resulting in an infringement. The facilitations of unauthorised access to an (offline) database in order to view information contained therein cannot be prohibited unless the contents of that database are subject to copyright or the reproduction right extends to the making of temporary copies in RAM etc. in relation to the protected structure of the database.

From the structure of Sec. 80(1) Copyright Act it may also be inferred that Estonian law permits a general “self help” right for users. This is because (1) the provision does not relate to a tort of circumvention and (2) because, even in case of persons entitled to make “free copies”, the right to instigate proceedings before the Copyright Committee does, on that basis, not preclude other means of access. This means that in those cases which are not subject to an obligation to pay remuneration (as under Sec. 18 (1) Copyright Act) the beneficiaries apparently have a choice to either circumvent in order to make copies for those purposes privileged or to instigate proceedings with a view to ordering right holders to abolish any use of technological measures. In the case of those uses subject to compensation (i.e. private use), nothing under Sec. 80(1) would restrict such self help since Sec. 80(1)(1) is not concerned with establishing a liability rule. The effect on right holders is that, in the long term, more emphasis needs to be placed upon levy systems rather than on TPM’s.

## E. Rights Management Information

Right management information systems are protected under § 80 (4) Copyright Act, which provides that authors and holders of related rights may add information on the exercise of rights to published works or objects of related rights. The types of such information is defined in Sec. 80(4)(2) Copyright Act as any information presented to the right holders that defines the work, the object of related rights or database or the terms of their use and identifies the author, the holder of related rights or the maker of a database. The provision also applies to figures and codes containing information on the exercise of rights. § 80(4)(3) restricts the scope of application to information contained in works protected under the Copyright Act (including related rights and the database maker right). According to the last sentence of the provision, such information may alternatively be “presented at the same time with the direction [of the work] to the public”.

§ 81(4)(2) Copyright Act makes the removal or alteration of information on exercise of rights as well distribution, communication, direction at the public or making available to the public of works, objects of related rights or databases from which information concerning the exercise of rights has been removed without authorisation or the information has been altered, a punishable offence (300 fine units). There is an extension of fines for legal persons (§ 81(4)(2) Copyright Act) which provides for a fine up to 50.000 Kroons. There is, again, no positive protection granted to persons applying DRM information against dealings or advertisements for removal technology, and the same reservations as to the compatibility of the provision with Directive (Article 7) applies.

## F. Legal protection

Section 81 (4) Copyright Act 2004 provides, that in cases of the *unlawful* use of a work or an object of related rights, the right holder may among other claim:

- compensation pursuant to § 1043 of the Law of Obligations Act, for the patrimonial and non-patrimonial damage caused through the unlawful use of a work or an object of related rights
- termination of the unlawful use of a work or an object of related rights and to refrain from further violation pursuant to § 1055 of the Law of Obligations Act
- delivery of that which was received by way of the unlawful use of a work or an object of related rights pursuant to §§ 1037 and 1039 of the Law of Obligations Act.

If, as a result of a violation of copyright legislation, a work or an object of related rights is communicated to the public, reproduced, distributed or altered etc., an entitled person may claim

- restoration of the work or object of related rights in the original form



- alteration of copies of the work or object of related rights by specific means, or
- destruction of pirated copies.

As noted, no criminal law sanctions referring to the circumvention of effective technological measures provided.

Pursuant to Section 81<sup>2</sup> Copyright Act 2004 the removal or alteration of electronic information on the exercise of the rights of rights holders and distribution, communication, direction at the public or making available to the public of works, objects of related rights or databases from which information concerning the exercise of rights has been removed without authorisation or the information has been altered, is punishable by a fine of 300 fine units. If the act is committed by a legal person, it will be punishable with a fine of up to 50,000 Kroons.

## **G. CONCLUSION**

The Estonian implementation leaves two areas for further observation. The first concerns the scope of certain limitations, particularly as regards use of works by the press and, likewise, use of news items etc.

The most important deviation certainly concerns the implementation of Articles 6 and, to a somewhat less significant degree, Article 7. Otherwise, the implementation is in accordance with the Directive.

## IX FINLAND

Finland has implemented the Copyright Directive through law 14.10.2005/821, amending the Copyright Act (8.7.1961/404). Criminal provisions related to the Copyright Act were implemented through law 14.10.2005/822 amending chapter 49 in the Criminal Code. Certain provisions (i.e. which libraries are referred to in Article 16 and consequent Articles) were added by a decree 1036/2005, amending the Copyright Decree.

Prior to the implementation, the Ministry of Education had a few reports made on specific subjects. A public consultation process was conducted by the Ministry both in connection with the initial Bill HE 177/2002 and the subsequent bill HE 28/2004. The results of the consultation process have not been made available to the public. Hearings were also organised by the parliamentary committees on several aspects of the law.

The first copyright bill (HE 177/2002) lapsed because of elections. The second copyright bill (HE 28/2004) was accepted with certain amendments in October 2005 through above mentioned laws 14.10.2005/821 and 14.10.2005/822 as well as decree 1036/2005.

The implementation process was difficult. The first bill (HE 177/2002) introduced to the parliament in 2002 was dropped because of elections. However, the parliamentary committee of culture and education decided to send the Ministry of education an open letter with instructions for the further preparation of the bill. In the letter the parliament requested the Ministry

- to concentrate on only those provisions necessary to implement the directive
- to take into consideration the basic civil rights
- to engage a larger hearing when preparing the next bill.

The Ministry did not do much to meet these requirements, except for adding in the subsequent new bill (HE 28/2004) a chapter justifying the proposed amendments from a civil rights perspective.

The explanatory memorandum of the bill has been criticized both among politicians, the academia and the public at large for being poorly written. The memorandum is written in an extremely technical fashion, which make it very hard to understand. The reasons for and the consequences of the amendments are not clarified. Very often reference is only made to the “necessity to implement the directive” and the great picture has been

difficult to get. In many instances the explanatory memorandum includes interpretations which can not prevail without basis in the actual provisions of the law<sup>191</sup>.

When adopting the new amendments of the statute, the Finnish Parliament adopted three statements concerning the statute. The government was asked to

- 1) follow up the impact of technological measures on the possibility to make copies for private use, leave a report on the subject to the Committee on Culture and Education before the end of 2006 and if necessary consider legislation ensuring the beneficiary of a right to reproduction for private use the means of benefiting from that exception,
- 2) follow up the impact of abolishing the right to compensation for simile-casting in accordance with a duty of retransmission,
- 3) analyse the legal problems regarding the use of historical photographs.

## **A. Exclusive rights**

### **I. *Reproduction Right***

There are no divergences with respect to the Directive.

Short-lived acts of reproduction seem to have been recognised as infringement of the reproduction right<sup>192</sup>. The statutory text was changed, i.e. a new provision was inserted in concordance with the directive.

According to Article 11 (3) a work made on the basis of a limitation may be distributed to the public or publicly performed in the fashion foreseen by the limitation. This is a

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<sup>191</sup> One example can be found in the new provisions in article 11, paragraph 5 of the Finnish Copyright Act. According to that provision, it is not allowed to make a copy on the basis of an exemption in the Finnish Copyright Act of an original (a master copy) reproduced or made available to the public without the authorisation of the author. The exception is the making of transient or incidental copies (Article 11a Copyright Act), certain reproductions in libraries and archives (Articles 16, 16 (a) -16 (c)) and the citation right (Article 22). (The reason for omitting from this provision citations for research or criticism or news reporting of published pieces of visual art in accordance with article 25 in the copyright act is not discussed in the memorandum). According to the explanatory memorandum, there is no need to include exceptions to this provision for uses that are governed by provisions on extended collective licensing, as the contracting parties could agree not to apply article 11 paragraph 5. However, without an explicit authorisation in the Finnish Copyright Act the collective society does not appear to have the power to limit the rights of the author in this way.

<sup>192</sup> Tietoyhteiskunnan tekijänoikeusdirektiivin 2001/29/EY kansallinen voimaan saattaminen. Opetusministeriö 10.7.2001. (A report prepared by the Ministry of Education on the amendments needed in order to fulfil the requirements of the Directive). Document available at <http://www.minedu.fi/opm/tekijanoikeus/tietoyhteiskunta.pdf>, visited April 8, 2006.

mandatory rule also applicable to use on the basis of an extended collective license, and may thus not be restricted on the basis of an extended collective license.

## **II. *Communication to the Public***

The general view seems to be that such acts of public interactive communication was covered by the provisions of existing copyright law. However, there were some difficulties in how they should be defined. In a supreme court decision (KKO 1999:115), the making available of copies of computer programs for download from a BBS was regarded as a breach of the reproduction and the distribution right (which is part of the more general right of making available to the public).

According to the new provisions the exclusive economic rights are divided into

the right of reproduction, and

the right of making a work available to the public in any of the following means:

- 1) by communication (*överföring till allmänheten*, fin. *yleisölle välittäminen*) of a work by wire or wireless means, including the making available of works in such a way that members of the public may access them from a place and at a time individually chosen by them (the communication right),
- 2) by publicly performing the work in the presence of an audience (the public performance right),
- 3) by offering copies of the work for sale, rent or loan or otherwise distributing it to the public (the distribution right), or
- 4) by displaying the work publicly without the help of technical means (the display right).

The implementation of the Copyright Directive led to a reformulation of existing rights, narrowing down the definition of the public performance right and the display right and introducing the communication right.

From a Finnish perspective it seems like the economic rights of the author were not totally harmonized, as the public performance right and the display right were left out from the Directive.

## **III. *Distribution Right***

See the definition of distribution right above.

The principle of exhaustion is applicable only to the distribution right and the display right. It does not extend to intangible transactions (on-line services) or tangible copies

made as a result of communication to the public in concordance with the provisions of the directive stating that exhaustion of rights are not applicable to works in digital form.

Copyright law in Finland permits restrictions upon the distribution right by way of restrictive licenses, but not within the common market

## **B. Exceptions and Limitations**

Article 5(1) of the directive was implemented as a new general provision, Article 11 (a), under chapter 2, which deals with copyright limitations. There does not seem to have been any particular problems with regard to existing limitations. Article 11 (a) is not applicable to computer programs or databases.

There is no specific provision regarding the three-step test. The three-step test has been considered by the legislator while drafting the Copyright Act. Therefore the judiciary does not necessarily explicitly apply the three-step test, but concentrate on whether a certain use falls under the provisions of the limitations as expressed in the Copyright Act. Occasionally the limitations leave room for interpretation, and in those circumstances the three step test will have significance. In a recent supreme court case (KKO 2006:12) the three step test was explicitly applied. Lower courts will follow the precedent.

### **I. *Transient Copies***

Article 5(1) of the directive was implemented as a new general provision, Article 11 (a), under chapter 2, which deals with copyright limitations. There does not seem to have been any particular problems with regard to existing limitations. Article 11 (a) is not applicable to computer programs or databases.

### **II. *Reprography***

Photocopying is subject to an extended collective license and is not considered a copyright limitation (see point 18 of the preamble of the Directive). However, the provisions are included under the heading of “limitations to copyright” in chapter 2 of the Finnish Copyright Act.

Art. 13 of the Finnish Copyright Act states:

“Copies of published works may be reproduced through photocopying or similar means on the basis of an extended collective license in accordance with Article 26”<sup>193</sup>.

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<sup>193</sup> Author’s translation.

### **III. *Private Copying***

The general provision on private copying (Article 12) in the Copyright Act was not amended, i.e. the existing provision was considered to fulfil the requirements under the EUCD.

Please also note the agreed statement of the parliament mentioned above, which instructs the government to make sure the beneficiaries of the limitation regarding private use will be able to benefit from the limitation.

As mentioned, this limitation already existed, but has been substantially limited. However, the limitations of the “private copying right” were introduced in other provisions than the actual “private copying provision in Article 12. The most important changes to the previous situation is a new provision in Article 11, that requires that the copy from which reproduction is made for private use must have been made and made available to the public subject to the authors authorization (the requirement that only “legal” originals may be reproduced on the basis of a copyright limitation). However, as regards reproduction for personal use the sanctions are limited to fair compensation and only if the person new or had reasons to believe that the original was produced or made available to the public without the authorization of the author. In addition, it has been specified that only single copies may be brought from abroad for personal use<sup>194</sup>.

Article 12 of the Finnish Copyright Act states:

“Any person may make single copies of a disseminated work for his private use. Such copies may not be used for other purposes.

It is also permitted to engage an outsider to make copies that are intended for the private use of the party ordering them.

The provisions of the second paragraph above do not apply to the reproduction of musical works, cinematographic works, utilitarian Articles or sculptures, or to the copying of any other work of art by artistic reproduction.

The provisions of this Article do not apply to a machine-readable computer program or to the construction of a work of architecture.”<sup>195</sup>

According to Article 11 (5) there is no subjective right of private copying. If a technological measure inhibits reproduction for private use, then the user have no remedies and may not circumvent the technological measure.

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<sup>194</sup> This is a new provision not based on the Directive.

<sup>195</sup> Translation of Finnish Copyright Act, available at the WIPO website [http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html).

#### **IV. Libraries, museums and archives (Article 5 (2) (c) EUCD)**

The limitation existed before and substantial changes were made in the implementation process. The limitations have been, and still are, restricted to non-commercial use. Most importantly the new provisions facilitate and clarify the rules pertaining to distance education and digital archiving. Many of the Articles below are based also on other limitations allowed in the Directive. Please note that many of these limitations are subject to extended collective license and may thus not be considered a limitation within the meaning of the Directive.

First, it should be noted that Article 13 is applicable also to reproduction by public libraries, educational establishments and archives. See above on Article 13. The use is subject to an extended collective license. According to previous extended collective licenses the photocopying of sheet music has been more limited than photocopying of other content. This practice will most certainly continue.

Art. 14 of the Finnish Copyright Act states;

“Copies of published works may be made on the basis of an extended collective license in accordance with Article 26 to be used for education or scientific research and may be used for this purpose by communication to the public through other means than dissemination through radio or television broadcasting. These provisions do not cover reproduction through photocopying or similar means.

Copies of published works performed by teachers or pupils may be recorded through voice and picture to be used within education. Such copies may not be used for other purposes.

Parts of a broadcasted literary work or, when the work is not extensive, the whole work may be incorporated in a test constituting part of the matriculation examination or in any other comparable test.

The provisions in paragraph 1 above regarding other works than works transmitted through radio or television broadcasting are not applicable to works, the author of which has prohibited the reproduction or communication of the work.”

Sections 1 and 4 of Article 14 are new. Art. 14(1) aims at facilitating distance education and provides a new right. Art. 14(4) establish a new right for the author (or other rights holder) to explicitly prohibit use. There are no rules regarding how this prohibition right is to be applied. No assessment of its effects on distance education has been made.

Article 16 of the Finnish Copyright Act regarding reproduction in archives, libraries and museums:

“Archives, public libraries and museums stated in a governmental decree may, as long as the reproduction is made for neither directly nor indirectly commercial ends, produce copies of works belonging to their collections

- 1) in order to preserve the material and assure its durability
- 2) for technical reconstruction and restoration of the material
- 3) for administration and organization of their collections and for other internal use needed in order to maintain their collections
- 4) in order to complete a copy of an incomplete work or to complete a missing part of a work published in several parts, unless the work or the completion needed is available through commercial distribution or communication.”<sup>196</sup>

Article 16 (a) of the Finnish Copyright Act regarding reproduction of works on behalf of the public and communication of the work to the public states:

“Archives, public libraries and museums stated in a decree may, as long as the reproduction is made for neither direct nor indirect commercial ends,

- 1) unless the work is available through commercial distribution or communication, through photocopying or similar means make a copy of a published work which is available in their collections and which is prone to damage, and make such a copy available to the public through lending,
- 2) provided that it can be considered reasonable, through photocopying or similar means make copies of single Articles that make part of their collections, news papers or magazines of their collections and short excerpts of other published works to be handed over to borrowers for their private use instead of the volumes or folders they make part of.

Archives, public libraries and museums stated in a decree may, as long as the reproduction is made for neither direct nor indirect commercial ends communicate a published work belonging to their collections to a member of the public for research or private study in the premises of the institution through dedicated terminals. This provided that relevant sales- or license terms or other contractual terms are not in contradiction with the communication and provided that digital copying or further communication of the work have been made impossible.”<sup>197</sup>

Article 16 (b) of the Finnish Copyright Act states:

“Libraries to which a copy of a work shall be conveyed in accordance with the Legal Deposit Act 420/1980<sup>198</sup> may

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<sup>196</sup> Author’s translation.

<sup>197</sup> Author’s translation.

<sup>198</sup> This is a kind of national archiving law.



- 1) use a copy included in their collections in accordance with Article 16 and 16 a above and under the conditions mentioned in those provisions
- 2) communicate a published work included in their collections to a member of the public to be used for research or private study through dedicated terminals, in the premises of such a library in which the material according to the Legal Deposit Act shall be placed and made part of the collections of the library, and in the Finnish Film Archive, provided that digital copying or further communication of the work have been made impossible
- 3) with the ends of incorporating them with their collections make a copy of works made available to the public through open networks (Internet)
- 4) with the ends of incorporating them with their collections make a copy of works which need to be acquired to the library's collections but which are not available through commercial distribution or communication.

The provisions in paragraph 1, point 1 and 4, are also applicable to libraries within which libraries mentioned in paragraph 1 places material in order to be added to the collection in accordance with the Legal Deposit Act.”<sup>199</sup>

Article 16 (c) of the Finnish Copyright Act regarding use at the Finnish Film Archive states:

“The Finnish Film Archive may

- 1) use a work included in their collections in accordance with Article 16 and 16 a above and under the conditions mentioned in those provisions
- 2) communicate a work included in their collections to a member of the public to be used for research or private study through dedicated terminals, in the premises of a library mentioned in Article 16 b, provided that digital copying or further transmissions have been made impossible, and
- 3) make a copy of a work made available to the public through dissemination in radio or television in order to incorporate them within their collections.

The provisions in paragraph 1, point 1 and 2, are not applicable to cinematographic works produced by foreign producers.

A work included in the collections of the Finnish Film Archive may, with the exception of cinematographic works produced by foreign producers, be used for research and cinematographic education at university level.

The provisions in sections 1-3 are also applicable to material subordinated to the deposit obligation and which is stored in premises acknowledged by the Cinematographic Works Archiving Act (576/1984).”<sup>200</sup>

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<sup>199</sup> Author's translation.

Article 16 (d) regarding the use of works in archives, libraries and museums on the basis of extended collective licenses states:

“Archives, public libraries and museums stated in a decree may, in accordance with an extended collective license and in accordance with Article 26

make copies of works included in their collections in other cases than those mentioned in Article 16 and 16 (a) - 16 (c)

communicate works included in their collections in other cases than those mentioned in Article 16 and 16 (a) - 16 (c).

The provisions in paragraph 1 above are not applicable to works, the author of which has prohibited the reproduction or communication of the work.”<sup>201</sup>

Article 16 (e) providing further provisions regarding the use of works in archives, libraries and museums states:

“In the cases mentioned in Article 16, 16 (a) and 16 (d) there may be provisions set in a decree on which archives, public libraries and museums may use a work or take advantage of an extended collective license in accordance with above mentioned sections, if

- 1) there is a legal provision regarding the functions or tasks of the institution,
- 2) the institution has a special legal obligation of archiving, storing or other service
- 3) the institution to a great extent serves scientific research, or
- 4) the institution is owned by the state.

Further provisions regarding reproduction in accordance with Article 16 and 16 (a) - 16 (c) may be enacted through a decree.”<sup>202</sup>

It is interesting to note that archives, public libraries and museums, according to Article 16 (a) - 16 (c), are obliged to take (technological) measures in order to make it impossible to copy or communicate works.

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<sup>200</sup> Author’s translation. The English translation of the name of Act 576/1984 has not been verified.

<sup>201</sup> Author’s translation.

<sup>202</sup> Author’s translation.

## **V. Broadcasters**

A provision similar to Article 5 (2) (d) EUCD already existed but was redrafted. The changes made are of a technical nature and no amendments would have been needed in order to fulfil the requirements of the directive.

Article 25 (f) of the Finnish Copyright Act (special provisions concerning radio and television broadcasts)<sup>203</sup>:

“A broadcaster may communicate a work subject to an extended collective license as stated in Article 26. The provisions of this paragraph do not however apply to dramatic works, cinematographic works or even other works if the author has prohibited the broadcasting thereof.

If a broadcaster has the right to communicate a work, the broadcaster may make a copy of the work to be used in its own transmission no more than four times during one year.

If the broadcaster wishes to use a work more than stated in paragraph 2 or during a longer period than one year, the broadcaster may make or have made a copy of the work subject to an extended collective license as stated in Article 26.

The provisions of the first paragraph above do not apply to the retransmission of a work included in a radio or television broadcast where the retransmission takes place at the same time as the original broadcast and without any change in content.

The provisions of the first paragraph above shall apply to radio or television broadcasts transmitted by satellite only if the satellite transmission takes place at the same time as the terrestrial transmission by the same broadcasting organization.”

## **VI. Social Institutions**

Such limitations existed before. No amendments were made. The limitation is more narrowly drafted than the provision of the Directive, as it is subject to requirements of time-shifting and informatory purpose. Therefore it was considered that the prejudice caused to rights owners is so minimal that no compensation is needed in accordance with point 35 of the preamble to the Directive.

Article 15 of the Finnish Copyright act on reproduction in certain institutions<sup>204</sup>:

“Copies of disseminated works included in radio and television transmissions may be made by audio and video recording in hospitals, senior citizens' homes, prisons, and

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<sup>203</sup> Paragraphs 1 and 2 the author's translation. Paragraphs 3 and 4 from the translation of Finnish Copyright Act available at the WIPO website [http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html).

<sup>204</sup> Translation of Finnish Copyright Act available at the WIPO website [http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html).

other similar institutions for temporary use in the institution within a short period following the time of the recording.”

There is no provision on fair compensation in connection to this Article.

Of course it can be questioned whether the law-makers have exceeded their margin of appreciation concerning the evaluation of the prejudice to the rights owners and whether the requirement of fair compensation is mandatory also in cases where the limitation is more narrowly drafted.

Another Article which is related to this limitation is the right to record radio and television transmissions of other work than cinematographic works (which also includes commercials) by educational establishments, a use covered by Article 14 (1) in the Finnish Copyright Act. Such use is subject to extended collective license and is therefore not considered a limitation in accordance with the definition of limitations set in the Directive.

## **VII. *Teaching and Scientific Research***

See art 14 paragraph 1 and Articles 16 (a) – 16 (d) above.

Such provisions existed, but some of them were modified. Except for the provision in Article 14 stated above, there are also the provisions in Article 18 (use in compilations intended for education) and Article 21 (public performance i.e. for educational purposes).

According to Article 18, minor parts of a work or, if it is not extensive, the whole work, may be inserted into a printed compilation intended for use in education. This provision complements Article 13 on the limitation for photocopying, since it allows printing (i.e. not photocopying). The Article does not allow copies of (whole or part of) works made for education and not the use of works newer than 5 years. The Article includes the only compulsory licensing provision in the Finnish Copyright Act. In practice the compulsory licensing means that the publisher of the compilation pays whatever he sees fit to the author. In case of differences the matter may be solved through a special proceeding (arbitration) set out in the Copyright Act. In the first bill (HE 177/2004) this limitation was abolished altogether as being unnecessary. In the subsequent bill the Article was reintroduced, but specifically limited to published (i.e. not digital) compilations. In the explanatory memorandum of the bill, Article 18 is considered to make part of limitations allowed under Article 5 (3) (o).

According to Article 21 published works, other than cinematographic or dramatic works, may be publicly performed for educational purposes. However, according to the new provision in Article 16 c referred to above cinematographic works may be publicly performed in connection with university level cinematographic education. Such use is not subject to provisions on fair compensation.

The previous provision in Article 14 on the right to record and publicly perform broadcasted works (other than cinematographic works), is now included in the new provisions on reproduction and communication in Article 14, paragraph 1. Such use is subject to extended collective license and the author may prohibit use under Article 14, except for recording of television or radio broadcasts of other than cinematographic works (see above).

Article 14 seems broader than the Directive in the way that there is no reference to use for illustration (only). However, it is more than likely that the right to educational and research use will be circumscribed in this fashion in the extended collective license. Other limitations to this limitation will probably also be included in the extended collective license.

Because of the new definitions on the economic rights it is likely that usage such as display and public performance of a work in a video conference (distance education or scientific meeting) will fall under the provisions of Article 14. Such use will be subject to an extended collective license (instead of being allowed and free of charge as stated regarding public performances in Article 21 and the right to display a copy of a publicly distributed work in Article 20) and may thus be prohibited by the author. The Ministry does not agree with this interpretation, but it remains difficult to support that conclusion.

It is a general rule in Finnish copyright law (Article 3 and Article 11 (2), the latter adding a requirement of mentioning also the source, when using a work on the basis of a copyright limitation), that the name of the author shall be stated in the manner required by proper usage. This is also applicable to use for educational purposes.

### **VIII.***Disabled People*

There were previously provisions on limitations for the benefit of people with a disability and the limitation was broadened in the new law to take account of new technology.

The earlier limitation allowed copying of literary or musical works in order for visually impaired people to be able to read them. The new provision also pertains to artistic work and also for other disabilities than the visually impaired. The new provision also includes the right to communicate the works, other than by broadcasting.

The reproduction of copies of a work for commercial purposes and lending as well as the communication of such work (where a copy of the communicated work remains with the disabled) is subject to extended collective licensing and is therefore not considered a copyright limitation in accordance with the definition of the Copyright Directive.

## **IX. *Current economic, Political or Religious Topics***

The previous limitations have been kept, and they seem to be in line with the directive.

A limitation for internal informatory and temporary use was redrafted and inserted as a new Article 13 (a), according to which

“Copies of Articles with adjoining pictures published in printed news papers or magazines may be made on the basis of an extended collective license in accordance with Article 26 to be used within authorities, businesses and associations for their internal informatory purposes and such copies may be communicated for this purpose through other means than dissemination through radio or television broadcasting. These provisions do not cover reproduction through photocopying or similar means.

A few copies of a work which makes part of a news program or similar made available through radio or television broadcasts may be used within authorities, businesses and associations for their internal informatory purposes within a short time of the recording.

The provisions in paragraph 1 above are not applicable to works, the author of which has prohibited such reproduction or communication of the work.”<sup>205</sup>

Paragraph 1 of this Article was considered to be a legislative solution regarding copyright management which is allowed. Paragraph 2 of the Article was based on Articles 5 (3) (c) and 5 (3) (o). Note that this provision does not apply to digitally published content.

There was also an amendment in connection with Article 23, according to which the name of the author and the source always shall be stated. According to Article 23, Articles in newspapers and periodicals on current religious, political or economic topics may be included in other newspapers and periodicals unless reproduction has been expressly prohibited.

Article 25 (b) of the Copyright Act states: “When a current event is presented in a radio or television transmission or as a film, a work visible or audible in the course of the said event may be included in the presentation to the extent required by the informatory purpose”<sup>206</sup>.

According to Article 25 works of art made available to the public may be reproduced in connection to news reporting (see further below). See also Article 25 (a) (2) below.

Of importance for the press is also the limitation in 25 (c) (which was not amended). According to Article 25 (c) written or oral statements made publicly (at a public event, court proceeding or similar) may be reproduced without the consent of the author.

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<sup>205</sup> Author’s translation.

<sup>206</sup> Translation of Finnish Copyright Act available at the WIPO website  
[http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html)

However, statements, writings and similar works presented as evidence in a court proceeding may only be published in connection with the case or the matter in which they were presented. The author has the sole right to make available compilations of his statements.

It is a general rule in Finnish copyright law (Article 3), that the name of the author shall be stated in the manner required by proper usage. This is also applicable to use for news reporting.

## **X. *Quotations***

There is a general quotation right in Article 22 and a specific quotation right regarding artistic work in Article 25. According to Article 22 “a disseminated work may be quoted, in accordance with proper usage, to the extent necessary for the purpose”<sup>207</sup>.

This quotation right is interpreted narrowly. There is a lot of case law and decisions by the Copyright Council on the interpretation of this provision. Because Article 22 does not allow the reproduction of the whole work, a specific provision on artistic work was needed (because works of art can not be “quoted” (i.e. a part of it taken), and taking only a part of an artistic work could be an infringement of the author’s moral rights).

Article 25 allows the reproduction of published work of art in connection with critical or scientific presentations and in a newspaper or magazine report on a current event, provided that the work has not been created for reproduction in a newspaper or magazine.

## **XI. *Public Security***

Such a limitation already existed and was not amended.

Article 25 (c) concerning use of public statements states<sup>208</sup>: “Oral or written statements made at a public event, or before an authority or at public meetings concerning matters of public interest may be used without the author's consent. However, statements and also writings or similar works cited as evidence may be used only in connection with an account of the case or the matter in which they were used, and only to the extent required by the purpose of that account. The author has the exclusive right to publish a compilation of his statements.”

Article 25 (d) concerning publicity of documents and judicial procedures states: “Copyright does not limit the right, prescribed by law, to obtain information from a public document.

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<sup>207</sup> Translation of Finnish Copyright Act available at the WIPO website  
[http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html)

<sup>208</sup> Translation of Finnish Copyright Act available at the WIPO website  
[http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html)

A work may be used when judicial procedure or public safety dictates such use.

A work used by virtue of the first or second paragraph above may be quoted in accordance with Article 22.”<sup>209</sup>

## **XII. *Speeches, Public Lectures etc.***

See above on Article 25 (c).

## **XIII. *Religious or Official Celebrations***

According to Article 21, para. 1, a published work may be publicly performed in connection with religious services. The bill (HE 2004/28) proposed to abolish this limitation, and it was fiercely discussed in Parliament. As a result this limitation was kept.

It can be noted that this provision is not applicable to public performances in church, which are not part of a religious service.

It can also be noted that there was an amendment to paragraph 2 of Article 21, which was amended in order to limit the limitation. According to Article 21 (2) a published work may be publicly performed on occasions where such performance is not the main event and to which there is no entrance fee and which are not organised for commercial ends.

There is a recent Supreme Court decision (KKO 2006:12) regarding whether the performance of Christmas songs in the church is allowed under Article 21 (2). It is rather common that the Church organises events during the Advent time. On this occasion religious Christmas songs were sung by the public to the accompaniment of the organist and the cantor employed by the Church. It was considered that the main purpose of the event was to perform music, and therefore the Church was liable of copyright infringement.

## **XIV. *Architectural Works etc.***

According to Article 25 a (3) a work of art may be reproduced in pictorial form when it is permanently located in or in the immediate vicinity of a public place. If the work of art is the main feature of the picture, the picture may not be used for the purpose of gain. A picture connected with a text may, however, be included in a newspaper or periodical.

According to Article 25 a (4) a building may be freely reproduced in pictorial form. No amendments to these provisions were made.

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<sup>209</sup> Translation of Finnish Copyright Act available at the WIPO website  
[http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html)



## **XV. *Incidental Inclusion***

The matter is covered by Article 25 (2); “When a copy of a work of art has been sold or otherwise permanently transferred with the consent of the author, or when a work of art has been published, the work of art may be incorporated in a photograph, a film or a television program, provided its use is of secondary importance to the photograph, film or program”<sup>210</sup>. No amendments to this provision were made.

## **XVI. *Advertising for Public Exhibitions etc.***

Such a limitation existed before. An amendment was made in order to limit the use to printed catalogues, i.e. not digital ones. Instead, pictures of works of art in order to promote exhibition or sale of the works may be used in digital form (the communication right) subject to extended collective license, unless the author prohibits such use.

## **XVII. *Caricature and Parody***

There is no such express limitation, but it has been recognized as a general principle of Finnish copyright law.

## **XVIII. *Demonstration and Repair,***

Subject to exhaustion of the right a work may be displayed according to Article 20./ According to Article 25 (e) buildings and utilitarian Articles may be altered by the owner without the consent of the creator if considerations of a technical nature or reasons connected with the use so dictate.

No amendments were made to these provisions, and according to the explanatory memorandum of the bill (HE 28/2004) there are no limitations in Finnish Copyright Act of the nature described in Article 5 (3)(l).

## **XIX. *Artistic Works***

See Article 25 (e) above. According to the explanatory memorandum of the bill (HE 28/2004) there are no limitations in Finnish Copyright Act of the nature described in Article 5 (3)(m).

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<sup>210</sup> Translation of Finnish Copyright Act available at the WIPO website  
[http://www.wipo.int/clea/docs\\_new/en/fi/fi054en.html](http://www.wipo.int/clea/docs_new/en/fi/fi054en.html)

## **XX. Research or Private Study (Article 5 (3) (n) EUCD)**

See Articles 16 (a) – 16 (d) above. In addition of the requirement of “dedicated terminals” there is a requirement that further copying or communication is made impossible.

No such limitations existed prior to the Directive, but were introduced when implementing the Directive.

## **XXI. Uses of ‘minor importance’**

According to the explanatory memorandum three provisions of the Finnish Copyright Act fall under Article 5 (3) (o); Article 18, Article 24 and Article 25 (a) (1).

See Article 18 above regarding the right to insert excerpts and works into printed compilations for educational use.

Article 24 of the Finnish Copyright Act states: “If a musical work is performed with text, the text may be incorporated in concert programs, etc., for the use of the audience.”

Article 25 (a) (1) of the Finnish Copyright Act “A work of art included in a collection, displayed at an exhibition or placed on sale may be reproduced in pictorial form in catalogues and notices concerning the exhibition or sale.”

## **C. Compensation system**

Private copying is subject to a levy on storing media (i.e. cassettes, CD, DVD, MP3-players etc). The provisions regarding the collection of levies are governed by chapter 2 of the Copyright Act. The manufacturer or the importer shall pay the levy. However, the reseller has the duty to show that the levy has been paid; otherwise the reseller is due to pay the levy.

The levy is paid to a collective society, which has been licensed (for a maximum of 5 years) by the Ministry of Education to collect the levy. The levy to be paid for each type of storing media is established in a decree by the Ministry of Education. No rules have been established regarding *how* the use of technological measures shall affect the levy. This is left to the Ministry to interpret.

## **D. Protection of Technological Measures**

The new rules on technological protection measures and electronic rights management information were inserted into a new chapter 5 (a) of the Copyright Act covering Articles 50 (a) – (e). Technological protection measures are covered by Article 50 (a) - 50 (b), electronic rights management information in Article 50 (c) and the applicability of above mentioned provisions to neighbouring rights in Article 50 (e).

Penal sanctions against circumvention are provided for in Article 56 (e) (1) of the Copyright Act (teknisen suojauksen loukkausrikkomus) and Chapter 49 Article 3 of the Penal Code (teknisen suojauksen kiertämisrikos) and penal sanctions for the production and making available of the means for circumvention of technological measures in Article 56 (e) (2) of the Copyright Act (teknisen suojauksen loukkausrikkomus) and Chapter 49 Article 4 of the Penal Code (teknisen suojauksen kiertämiskeinorikos).

The Copyright Act provides for sanctions for misdemeanours (“small crimes”) and the Penal Code for felonies (“big crimes”). In both cases fault (gross negligence or intent) is required for liability to arise. For a felony to be at hand there is an additional requirement that the act might cause serious detriment or damage (to the interests of the rights holder). This requirement is fulfilled, for example, if a device or service enabling circumvention is made available on the Internet.

The circumvention of technological measures or production and making available of goods or services enabling or facilitating the circumvention of technological measures may cause liability to pay damages or fair compensation. Forfeiture of goods is also available, i.e. products enabling the circumvention or copies of works from which the technological measure has been removed may be prescribed by the court to be seized and destroyed, altered in specific ways, conveyed to the injured party or rendered incapable of unauthorized use.

#### **I.** *The definition of ‘effective’ technological measures*

The definition of technological measures (Article 50 (a)) is similar to the definition in the directive. Protected technological measures are

- ☐ technologies, devices or components which
- ☐ in the normal course of their operation
- ☐ serve to prevent or restrict acts
- ☐ in respect to copyrighted works,
- ☐ which are not authorized by the author or subsequent right holders.

The protection coincides with the scope of copyright protection in the sense that the protection is only given to effective technological measures protecting a “copyright protected work”. Circumvention seems to be allowed if the technological measure protects material that is not copyrightable, has fallen into the public domain or does not cover an exclusive right defined in the Act.

Excluded from the legal protection of technological measures is circumvention of technological measures in order to conduct encryption research or in order to be able to listen to or view a work, provided the copy of the work has been legally acquired. The right to circumvent a technological measure in order to be able to listen to or view a

work does not give the user a right to make copies of the work even for private use. This excludes the possibility to make back-up copies of works that are legally acquired, if a copy protection measure blocks copying.

The general grounds for limitation of the legal protection of technological measures as stated in the preamble of the directive (point 40, 50, 51, 54, 57) have not been expressly implemented, except as regards cryptography research and the right to undertake acts allowed under Article 5(3) or Article 6 of the Computer Program Directive (i.e. reverse engineering).

## **II. *Acts of Circumvention***

The provisions regarding prohibited acts coincide with the provisions of the Directive. Article 50 (a) concerns circumvention of technological measures.

Article 50 (a) in the Copyright Act provides for a right to circumvent a technological measure in order to be able to view or listen to a legally acquired copy of a work. This provision does not, however, cover works made available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. Therefore there seems to be a generally accepted principle that one has the right to view or listen to copies legally acquired, whether in analogue or digital format.

## **III. *Acts dealing in anti circumvention devices***

Article 50 (b) - production and making available of products or services designed to or facilitating the circumvention of technological measures. The offering of such services or devices constitutes an unlawful act, if the devices or services: are advertised for circumvention, or have only a limited commercially significant purpose or use other than to circumvent technological measures, or are primarily designed for circumvention

According to the explanatory memorandum a device or service shall not readily be regarded to be primarily designed for circumvention. At the same time it is clear that a device can be viewed as primarily designed for circumvention if the lawful uses are only ancillary.

## **IV. *Beneficiaries of limitations and technological protection measures (Article 6 (4))***

According to Article 50 (c) a person who has legally acquired a copy of a work or access to a work protected by a technological measure has the right to use a work to the extent necessary in accordance with the following copyright exemptions;

Article 14 paragraph 3 (the right to use a work in examination for the General Certificate of Education at Advanced level or similar examination); Article 15 (reproduction of radio and television transmissions in certain institutions, archives, libraries and

museums); Article 16 (reproduction in certain archives, libraries and museums for the purpose of maintaining, restoring or archiving the material legally acquired by them), Article 16 (a) (right to make available a work for certain purposes in certain libraries and museums); Article 16 (b) (use of works in national archives); Article 16 (c) (use of works in the Finnish Film Archive); Article 17 (making works available for disabled persons); Article 25 (d) paragraph 2 (use by broadcasting companies in accordance with a legal obligation to record and preserve a work), or Article 25 (f) paragraph 2 (allowing broadcasting companies who are authorized to use a work, to make a copy of a work for broadcasting purposes). To the extent that the limitations do not exist or are more narrowly drafted than the Copyright Directive, the limitations to be assured by the Copyright Directive have not been implemented.

The obligation to allow the uses mentioned in the exemptions above is applicable not only to the author, but also to anyone who has been authorized by the author to make the work available to the public.

The obligation to provide the means to use a work in accordance with these exemptions does not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them (i.e. works made available on-line).

The obligation to allow the uses mentioned in the exemptions above is to be fulfilled primarily through voluntary means. In case this is not possible, the statute provides for an arbitration procedure. According to the Act, only the users defined in the copyright exemptions mentioned above may request an arbitration procedure. This excludes other interested parties, such as users of libraries and museums, from bringing a case to arbitration.

It is not totally clear what will happen if the rights holder can not be found or does not for some other reason appear before the arbitration body. In these cases it is likely that the users may obtain the right to circumvent a technological measure on their own. The law does not clarify which means must be provided in order to enable circumvention by providing for affirmative measures (such as providing devices or services enabling the circumvention of the technological measure).

#### *V. Relationship between technological measures and limitations*

The general rule seems to be that the author may prevent use of his/her work by applying DRM (technological measures + rights management measures), except for in the instances described above. It seems clear that in case an author has a right to prohibit use in accordance with a copyright limitation, he may use DRM to prohibit such use. It should also be noted that the provisions in Article 16 (a) – 16 (c) regarding communication of works to dedicated terminals within the premises of the archive, public library or museum contains an obligation to take measures in order to make it technically impossible for users of the terminals to make copies or transmit the work.

This provision can be interpreted to include an obligation to use technological measures in order to protect the interests of the author.

In certain instances technological measures may be regarded as a fault to be repaired in accordance with the Consumer law provisions.

In the implementation process the problem caused by the e-commerce clause of the Directive has not been remedied. This relates to the problem of establishing an unlimited right for authors to set whatever conditions on use they wish. The e-commerce clause seems to be in contradiction with basic human rights. However, as this provision concerns contract law (which is not harmonised in the Directive), this problem could have been dealt with by the national legislator. Unfortunately, the legislator did not discuss this point.

It should further be noted that the Act on Legal Deposit will be revised. According to a committee report<sup>211</sup> discussing the revision of the Act there would be an obligation to provide the means for using and copying a work (password, computer program etc.), whenever there is an obligation to hand over a work for deposit. In case this obligation is not fulfilled, the establishment responsible for depositing the work has a statutory right to circumvent the technological measure.

It is not clear how one could benefit from the statutory rights to circumvent a technological measure<sup>212</sup>, absent legal markets for circumvention technology and services.

## **E. RIGHTS MANAGEMENT INFORMATION**

See above in general regarding the implementation of the provisions regarding technological measures and electronic rights management information. There seems to be no major disparities with the Directive.

## **F. Sanctions**

There are new sanctions regarding the misdemeanour of circumvention of a technological measure in Article 56 (e) (1) and felony of circumvention of a technological measure in Chapter 49, Article 3, of the Penal Code as well as misdemeanour of production and making available of the means for circumvention of technological measures in Article 56 (e) (2) and production and making available of the means for circumvention of technological measures in felony of Chapter 49 Article 4 of the Penal Code.

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<sup>211</sup> Joukkoviestinnän arkistointiprojektin muistio. Opetusministeriön työryhmämuistioita ja selvityksiä 2003:14

<sup>212</sup> The right, according to Article 50c, to circumvent a technological measure in order to be able to view or listen to a legally purchased copy of a work, and the possible right according to the proposed Act on Legal Deposits to circumvent in order to be able to use and copy a work if the means of using and copying the work has not been provided by the rights holder.

There are also new sanctions regarding the misdemeanour of infringement of electronic rights management information in Article 56 (f) and felony of infringement of electronic rights management information in Chapter 49 Article 5 of the Penal Code.

Gross negligence or intent is required for liability to arise. For a felony to be at hand there is an additional requirement that the act might cause serious detriment or damage (to the interests of the rights holder). This requirement is fulfilled, for example, if a device or service enabling circumvention is made available on the Internet. There is no requirement of the acts having a commercial end. Regarding infringement of electronic rights management information there is an additional requirement of “knowing or having reasonable grounds to suppose that his act may cause, make possible, facilitate or conceal infringement of a right acknowledged by this law” (i.e. the moral and economic rights of the author).

There were also amendments to the previously existing felony of copyright infringement (*tekijänoikeusrikos*) in Chapter 49, Article 1 of the Penal Code. Firstly, it was extended to infringement of *folkloristic works*. Secondly, liability for the felony of copyright infringement may arise also in cases where the use has no commercial ends, but information technology or information networks have been used in committing the crime and the use gives rise to substantial harm to the interests of the rights owner.

There may be liability to pay fair compensation and damages. Forfeiture of goods is also available, i.e. products enabling the circumvention of technological measures and copies of works from which the technological measure has been removed may be prescribed by the court to be seized and destroyed, altered in specific ways, conveyed to the injured party or rendered incapable of unauthorized use.

No new types of remedies has been introduced, although it is now discussed in the Parliament whether there should be an obligation to publish a notice that one has been deemed liable of copyright infringement.

However, existing remedies now encompasses also the new types of infringements of acts referred to in Article 6 and 7 of the Directive.

The e-commerce directive has been implemented in Finland. Intermediaries may be liable in case there is not “safe harbour” as those introduced in the e-commerce directive. It should be noted that a “notice and take-down” procedure has been established in Finnish law.

## G. CONCLUSIONS AND GENERAL COMMENTS

A few comments on the Nordic system with extended collective licenses could be helpful. Four types of licensing are now foreseen by the legislation:

- individual licensing

- extended collective licensing *with* a right to prohibit use
- extended collective licensing *without* a right to prohibition (by the individual), and
- compulsory licensing.

Individual licensing is the main rule.

In certain cases there are minor limitations to this rule, i.e. extended collective licensing *with* a right to prohibit use. In these cases a collective society is given the right to license works in a particular field, even on behalf of authors not belonging to the collective society (that is, who have not made an agreement of representation with the collective society). This kind of licensing can not be regarded as a limitation of the exclusive right, as the author may exclude use if he or she so wishes.

Then there is extended collective licensing *without* an individual right to prohibit use. Extended collective licensing without a right of prohibition has been considered an extended collective license excluded from the applicability of the Directive (point 18 of the preamble to the Directive). However, in my opinion extended collective licensing without a right to prohibit use may be regarded as a limitation, as the individual author may not preclude use.

In both cases with extended collective licensing very specific terms and limitations to the use are set. This means that any use which exceeds what is allowed under the extended collective license is a copyright infringement unless individual licensing is undertaken. Furthermore, the collective society has in neither case any obligation to contract.

One should also bear in mind that the author (or other rights owner), whether or not he has assigned his rights to a collective society, always has the right to request his share of the compensation which the licensor has paid to the collective society.

As stated above, there is only one Article foreseeing compulsory licensing (Article 18 of the Finnish Copyright Act, which concerns compilations for educational use). In that case there is no collective license further limiting the “user right”. Neither is there specific terms regarding the amount to be paid. Such payments are not handled by collective societies.

The system with extended collective licenses was substantially reformed in connection with the implementation of the Directive. Most importantly any collective society (that is, also foreign ones) may apply for the right to become the collective society which will negotiate the agreements and collect royalties. Secondly, and this affects mostly the public sector, the extended collective licensing system will be distributed. Whereas the Ministry of Education currently negotiates the terms of the extended collective license on behalf of all public educational establishments in Finland, in the future there may be extended collective licenses at different levels. This gives more flexibility, but at the same time substantially raises the transaction costs and redistributes the budgetary



consequences. The compensation will be paid from the budgets of individual institutions instead of the Ministry and the institutions also need to engage in the negotiation process, which requires competent personnel understanding copyright law.

It should also be noted, that even though many limitations, especially those subject to extended collective licenses, seem (overly) broad they are usually dramatically narrowed through the terms of the extended collective license. Any use exceeding the terms of the extended collective license is considered a copyright infringement.

Another interesting Article of the Finnish Copyright Act, which should be mentioned in connection with copyright limitations, is Article 11. Some important (and disputed) amendments were made to this Article. According to 11 (5) a reproduction made on the basis of a limitation may only be affected if the original has been reproduced and made available with the authority of the author. Its application to personal copying has been explained above. The provision is not applicable to transient copies, copies made by public libraries, archives and museums, quotations or the provisions in Article 25 d on use for public purposes (transparency of the acts of authorities, use for the purpose of legal proceedings or public security). Therefore this provision is applicable, among others, to use for educational purposes (Article 14) and quotations of art work (pictorial quotations) and incidental inclusion of a work in other material (Article 25). The obligation to make sure the original is “legal” becomes even more oppressive when considering also the changes made in the penal provisions, and especially the new penal liability (felony, i.e. “big crime”) even for use with no commercial ends, provided that information technology has been used when committing the crime and provided that the author has encountered substantial damage to his interests. It can be noted that in Sweden the requirement that the original must be “legal” is only applicable to private copying.

One should also note that there is no implied license doctrine in Finland, although in accordance with general contract law silent agreements are valid<sup>213</sup>. Therefore all content made available on the Internet is subject to copyright, and no free print-outs may be taken or digital copies made. The view of the Finnish doctrine on this matter is that publication of content on Internet only gives the right to view and listen to content in private. This also means that if one wishes to publicly perform (i.e. show through a screen viewable by more than one person) content from the Internet, then this is considered an act of public performance which must be licensed. This view has been established inter alia in the extended collective licenses regarding photocopying within educational establishments. According to the agreement compensation is paid also for print-outs of content freely available on the Internet, unless subject to individual licensing terms.

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<sup>213</sup> Therefore, in some instances one may rely on general contract law. However, silent agreement usually requires a personal relationship, which principally does not exist when works are made available on the Internet.

It should also be noted that the “public sphere” is largely interpreted. Thus, everything that takes place in organisation to which “the public” may have access is considered public, most notably classrooms and kindergartens (since “anybody can become a pupil of the school”). This interpretation of the public sphere also extends to closed Internet domains such as e-learning environments requiring individual passwords and intended for a special course. This means, that if an assignment is given in which pupils are requested to modify a work (for instance make an arrangement to a musical composition) and post it in such an e-learning environment for discussion by the course mates, this is subject to individual licensing, since Article 14 (1) is not applicable to such use (modification of a work)<sup>214</sup>.

The interpretation of what is public also affects the interpretation of what is private. It seems like reproductions for “private use” is more narrowly interpreted in Finland than in Sweden. It is highly questionable if photocopying an Article at work for gaining knowledge needed in your profession would be considered a private use in Finland. The matter has not been dealt with by the Supreme Court, but the general view seems to be rather strict on this matter.

In the opinion of the respondent to the questionnaire, the wide interpretation of rights in conjunction with narrowly interpreted limitations, strict liability for copyright infringement and a lack of implied license doctrine cause a risk of under-use of informational resources. That is, informational resources are used to a lesser extent than would be socially optimal. One could hope that the European legislator would take measures in order to make sure that substantial under-use of informational resources for non-commercial ends (and in particular for purposes of education and research) is avoided. At the same time it is important to maintain a high degree of copyright protection and such measures should not unduly restrict the rights of the copyright owner and distort markets.

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<sup>214</sup> In addition, nothing says that musical compositions will be included in use allowed under the extended collective license.

## X FRANCE

The Directive has been adopted on the 30<sup>th</sup> of June 2006 by the Senate and the Assemblée Nationale. The Bill coming from the government has been discussed in the Assemblée Nationale in December 2005 and March 2006, and was adopted on the 21<sup>st</sup> of March 2006. It was discussed and adopted in the Senate May 2006. After a discussion in a bicameral commission, the law was enacted at the end of June. The transposition bill adopted on the 30 June 2006 modifies the Code of Intellectual Property or Code de la Propriété Intellectuelle (hereafter CPI), as well as some other laws.

The bill adopted on 30 June 2006 was presented to the French Constitutional Council which, on 27 July 2006, inserted certain further amendments. The law came into force following publication in the Official Journal on 4 August 2006.

No national consultation or impact assessment was carried out, but the legislative discussions about the transposition in 2005 and 2006 have led to huge media coverage and to petitioning campaigns from users, consumers associations and collective societies. Artists have also taken side in the debate.

The key issues that were raised concerned the question of the P2P file-sharing and the private copy, as well as the protection of DRM and exceptions (mainly private copy).

Most of the media coverage took the defence of the users, denouncing the criminalization of the file-sharing and of the private copy, reclaiming a free access to culture and creative content. The music industry and other copyright industries were largely diabolised. It was rather odd to witness such a focus on anti-copyright position in a country where the droit d'auteur is still so important.

The debate at the Parliament was particularly fierce. MPs from the opposition with MPs from the right-wing (governing the country) opposed certain aspects of the Bill. It was often heard that it was unfair to put in jail the children who share music on the Internet (MPs generally referred to their own children or to those of the Ministry of Culture). Some have even asked for the demission of the Minister of Culture in charge of that Bill.

### **A. Exclusive rights**

No modifications have been made to the exclusive rights. A new Article has been inserted that says that "the author is free to make her works available to the public for free". Such an addition does not add anything to the law since it only expresses the essence of the exclusivity attached to the copyright. One can understand it by the context in which the transposition has taken place and by the will of the Parliament to include a reference to open source movement.

## **I.    *Reproduction Right***

The right of reproduction will not be modified by the transposition bill. It is stated at Article L.122-5 of the CPI and defined as : " the material fixation of the work by any means that enable its communication to the public in an indirect way".

The reproduction right of the related right owners has not been modified either. Article L. 212-3 CPI. requires the written authorisation of the performer prior to the reproduction of her performance. Art. L. 213-1 and 215-1 CPI require the authorisation of the phonogram and videogram producer for making a reproduction of the phonogram or videogram. Article L. 216-1 CPI similarly require the authorisation of the enterprise of audiovisual communication (notion equivalent to a broadcaster).

There was no express provision dealing with temporary reproductions under the existing law, save for computer programs (Article L. 122-6 CPI). The position as regards the status of temporary copies as reproductions is uncertain and the issue has, as far as is discernible, not been with in court. Many legal scholars doubt the necessity to expressly extend the right of reproduction to ephemeral acts. They consider that the French concept of the reproduction right that indicates that a copy is deemed to be a reproduction only when it enables the communication of the work to the public in an indirect way suffices to determine whether an act of temporary copy constitutes an unlawful reproduction. Under that view, not all temporary technical copies will be unlawful, if they cannot enable the public to perceive the work from that sole copy.

## **II.   *Communication to the Public***

The right of communication is known in France as the *droit de representation*. It is defined as the communication of the work to the public by any means, namely by public recitation, dramatic performance, public presentation, public screening and transmission of the broadcast work in a public space and by broadcasting.

This definition was not modified by the transposition bill.

The right of making available has thus not been expressly introduced in the law. It has been considered that such a right was already covered by the broad definition of the representation right, which had previously been applied in court so as to cover acts of Internet uses and making available on demand.

## **III.   *Distribution Right***

The situation of the distribution right is complex under French Law. Authors enjoy a right of *destination* over their works which entitles them to authorise or prohibit any use made of reproductions of their works. It is generally considered that this destination right includes the right to oppose the distribution of tangible copies of copyrighted works.

However, as far as software is concerned, Article L. 122-6 CPI expressly recognises a right of distribution, and the correlating principle of exhaustion, in accordance with the Software Directive.

As to related rights, an express right is also granted to producers of phonograms and films and to broadcasters, but not to performers. However, the exhaustion of such rights of distribution is not explicitly included.

The transposition bill did not want to change the present situation by introducing a explicit right of distribution. Therefore, the application of the right of destination will keep on covering distribution of the work.

However, it was felt necessary to introduce the rule of the exhaustion, which was done by Article L. 122-3-1 CPI for copyright, and by Article 211-6 CPI for related rights. Those Articles state that "when the sale of a tangible copy of a work (or of a subject matter protected by a related right) has been authorised by the right owner on the territory of a Member States of the EC or of another State, member of the European Economic Area, the resale of this copy cannot be prohibited in the EC and in the EEA". The rule of exhaustion is thus not formulated as a limitation of the right of distribution (that does not explicitly exists anyway) but as an inherent exemption on the destination right.

As to the possibility of restricting the distribution rights, there is no explicit answer in the law. One court case has held that the author of a software was not entitled to impose to users further conditions of commercialisation of a sold copy of the software, due to the exhaustion principle.

## **B. Exceptions and Limitations**

The three-step test has been implemented in the French CPI by the transposition bill, applying to both for copyright and related rights as well as to the database *sui generis* right.

During the implementation process, case law has applied the three-step test to assess the admissibility of the private copying exception in one peculiar case. The case dealt with technological measures applied to DVD. A consumer wished to make an analogue private copy of a film to show it to his parents who did not possess a DVD player. The technological measure prevented him from doing so. The court first used the three step test to assess the legitimacy of private copying. It justified their competence for applying the test on the grounds of the default of the French lawmaker to not having transposed the Directive in due time. Therefore, the judges felt they had to construe the exceptions in the light of the Directive and apply the three-step test on behalf of the legislator. While in the first instance it was reasoned that the private copying of DVD's would violate the normal exploitation of the film in the form of DVD sales, the Paris Court of Appeal held that harm to such normal exploitation was not proven, and that it was improbable that the consumer, having lawfully bought the DVD, would have bought a second copy thereof if impeded to make the analogue copy he wishes.

The Court of Cassation has affirmed that view in a complex, and somewhat difficult to understand, decision. The court affirmed that the private copying of a DVD, even in an analogue format, does harm the normal exploitation of films, since the sales of DVD's are decisive to cover the investments in the making of films. However, it was not further explained where such harm would exactly lie. The court of cassation seems to have judged on the merits, which is beyond its competence.

### **I. *Transient Copies***

The exemption for temporary act of reproduction has been implemented in the Articles dealing with exceptions to copyright (Article L. 122-5 CPI, as a new 6°) and in the Article dealing with exceptions to related rights (Article L. 211-3 CPI, as a new 5°). The formulation of the exception is almost similar to that of the directive. It says that the author (or related right owner) shall not prohibit: "temporary reproduction, having a transient or incidental nature, when it is an integral and essential part of a technical process and whose sole purpose is to enable a lawful use of the work or its transmission in a network between third parties by an intermediary. Such temporary reproduction must not have an economic value of its own". The slight differences in formulation seem not to be relevant. Article 122-5 further mentions that this exception does not apply to computer programs and databases.

### **II. *Reprography***

There is no material distinction between reprographic copying and general private copying (see below) under French law. The claims for compensation are also identical. A specific provision concerning the transfer of compensation claims is, however, contained in Article L-122-10 CPI. According to this provision, the rights for remuneration for reprographic copying are automatically transferred to the respective collective society for mandatory collective management. The collecting societies are the CFC (Centre Français de la Copie) and the SESAM (Société des Editeurs et Auteurs de Musique). This provision has not been modified as a result of the implementation of the Directive.

### **III. *Private Copying***

The exception for private copying already existed in Article L 122-5, 2° CPI, and has not been modified. It allows the making of copies for strictly private purposes and only for the private use of the person making it. The copying must not be done for collective uses. The limitation, according to case law, is also restricted to natural persons.

The transposition Bill added the requirement to "take into account the utilisation of technological measures and their possible effects on the uses covered by the private copy exception", under the rules defining the modes of determining the individual levy to be paid as compensation for private copy.

In the last two years, there have been numerous cases concerning P2P file sharing resulting in criminal convictions for both uploading and downloading of illegal copies

using peer to peer technologies. Some case law has however held that the downloading of works for a private enjoyment through P2P file-sharing networks was not a copyright infringement since it was deemed private copy.

The Bill now is clear on the prohibition of file sharing. Whereas acts of uploading are usually within the remit of the making available right (and thus the private copying exception does not apply), users downloading protected works will now infringe the reproduction right. However, it is based on sanctions which cover acts of both downloading and making available, and from the text it seems to follow that sanctions only apply if an active participation in file sharing networks can be proven. It is not entirely clear whether a mere copy (which is not subsequently made available) falls within the private copying limitations or whether it still constitutes an infringing use.

The recent decision rendered by the Constitutional Court confirmed that courts are required to additionally apply the three step test to assess the scope of the private copying limitation.

The French law also makes specific criminal provisions for active illegal file sharing<sup>215</sup>. The position as regards passive uses of illegal peer to peer networks remains subject to general copyright law.

#### **IV. *Libraries, museums and archives***

A new Article L. 122-5, 8° now allows "specific acts of reproduction made by publicly accessible libraries, museums or archives, which are not for direct or indirect economic or commercial advantage". The text is similar to the Directive, save for the omission of educational establishments. The permitted acts of reproduction should be aimed towards the preservation of works or their on site consultation. The exception also applies to related rights.

#### **V. *Broadcasters***

This exception did not exist before the transposition process. It was partly implemented as far as related rights are concerned. Article 214-1 CPI stipulates that performers and producers of phonograms cannot oppose the reproduction of performances or phonograms strictly reserved to add soundtracks to a broadcasting organisations own program. This significantly differs from the exception foreseen under the Directive and is rather more restricted, particularly since it does not cover copyright, and also because it is not restricted to ephemeral copying.

#### **VI. *Teaching and Scientific Research***

Prior to the transposition, France law knew no exception for educational activities. There was strong pressure from various lobbies and the media to implement a new

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<sup>215</sup> See below, XF, p. 219.

exception in that regard. Many MPs were also in favour of such an exception and many amendments were submitted to that purpose. The government considered that allowing for such an exception would prejudice the exploitation of works and preferred to refer to collective agreement to solve the issue. In January 2005, the Ministry of Education and the Ministry of Culture (in charge of copyright matters) have signed a common declaration setting out the overall framework for negotiations between the education sectors and the copyright and related rights holders.

An exception was, however, introduced during the transposition process. A new provision has been added to Article 122-5 CPI that allows the communication or reproduction of excerpts of works, for the illustration of teaching or research.

The conditions of this exceptions are as follows. Works made for educational purposes, sheet music and works made for a digital edition of literary works are excluded from the scope of the exception. The public to whom the use of the work is directed must be composed of pupils, students, teachers or researchers directly concerned; the use does not lead to a commercial exploitation; a compensation claim is provided by the law.

It should be noted also that the exception will entry into force only in 2009.

The exception applies also to related rights and the database *sui generis* rights under the same conditions.

## **VII. *Disabled People***

A complex exception has been introduced in Article L. 122-5, 7° CPI, which allows "the reproduction and representation by legal persons for the purpose of a strictly private consultation of the work by persons suffering from a disability". The exception is subject to the following conditions. The disability should be motoric, mental, sensorial, psychological, cognitive or physical, and should amount to a rate to be determined by the Conseil d'Etat. It should be recognised by a specialised commission or recognised by a medical certificate. The reproduction or representation has to be carried out by a legal entity or publicly open establishments such as libraries, archives, documentation centres or multimedia cultural centres. A list of eligible institutions is to be determined by the authorities. The legal entities or establishments benefiting from the exception shall prove their professional activity of devising and making supports to the benefit of disabled people. The same exception applies to related rights (Article L. 211-3, 6°) and to the database *sui generis* rights.

## **VIII. *Current economic, Political or Religious Topics***

An exception existed already as far as press reviews were concerned (see Article L. 122-5, 3°b). A new exception has been introduced in Article L. 122-5, 9° to allow the whole or fractional reproduction, for an information purpose, of a work of graphical, plastic or architectural art, by means of written, audiovisual or on-line press, solely for direct information and in connection with that information, as long as the author's name is



indicated". The exception does not apply to works that consist by themselves in making this news reporting and should be strictly limited to the information purpose.

A few years ago, the absence of such an exception in the French law led to a famous case where a national television was taken to court by the heirs of the painter Utrillo for having reproduced and communicated works of the painter when broadcasting a TV show about a current exhibition of his works. Since the reproduction was in whole, the court of cassation decided that the quotation defence was not allowed to television companies. The doctrine had criticised the decision and the lack of a specific exception in the law.

#### **IX. *Quotations***

The exception relating to quotations existed but was modified. It allows for the analysis and short quotations justified by the critical, polemic, pedagogical, scientific or informational nature of the work in which they are incorporated.

The main restriction appearing in that exception is that it is limited to short quotations. That "shortness" implies that the exception cannot apply to works of visual arts.

#### **X. *Public Security***

Such an exception existed before the transposition. It was systematically allocated to copyright limitations but under a general provision (Article L. 331-4 CPI). It asserts that the rights mentioned in the Code cannot prevent the acts necessary to a jurisdictional, administrative or parliamentary procedure or for the purpose of public security.

The application of this provision to procedure of parliamentary control has been added during the transposition process.

#### **XI. *Speeches, Public Lectures etc.***

The law allowed (Article L. 122-5, 3° c) not modified by the transposition), by means of press or broadcast, in connection with the news reporting, the communication of public speeches pronounced in political, administrative, judicial or academic assemblies, as well as in public political meetings and official ceremonies. The law does not require that the source and the name of the author be indicated.

#### **XII. *Advertising for Public Exhibitions etc.***

Such an exception existed before and has not been changed by the transposition. It allows reproductions (and not communication), in whole or in part, of works of graphic or plastic art to appear in the catalogue of a public sale occurring in France, regarding the copies made available to the public prior to the sale in the sole purpose of describing the works of art offered for sale.", Article L. 122-5, 3° d) CPI.

### **XIII. *Caricature and Parody***

Such an exception existed before the transposition and it was not modified. It allows the parody, caricature and pastiche, taking into account of the laws of the genre, Article 122-5, 4° CPI.

### **XIV. *Research or Private Study (Article 5 (3) (n) EUCD)***

This exception did not exist before the transposition. It has not been implemented in the list of exceptions, but it appears in the provisions dealing with the obligation to deposit copies of works with the National Library. Such provisions are not part of the copyright law but of the code of the Patrimony. Article L. 132-4 of the Code du Patrimoine states that the author cannot prohibit organisations in charge of such deposit (1) the consultation of works on the premises by researchers duly authorised ("accrédités"), by each organisation in charge of the deposit, on individual terminals the usage of which is reserved to those researchers, and (2) the reproduction of a work on any support and by any means, when this reproduction is necessary for the collection, conservation and consultation purposes as referred to in (1).

This "exception" also applies to related rights and to the sui generis right in database.

This provision is more restricted than the exception of the directive since it only applies to specific establishments in charge of the legal deposit of works and to some researchers.

The exception for the benefit of libraries, mentioned above<sup>216</sup>, also includes the possibility to make a reproduction to enable the consultation on site.

## **C. Compensation System**

Private copying was already subject to a levy. The levy system has not been modified by the transposition. The levy is paid by manufacturers, importers, or intra-EU acquirers of blank tapes or supports for private copies. The level and modalities of levies are determined by an ad hoc commission gathering representatives of the different stakeholders and is collected by a collective society. According to a new Article 311-4 CPI, a claim for remuneration cannot be exercised if compensation has already been paid (such as under an individual license). In addition, the application of technological protection measures must be taken into account.

## **D. Protection of Technological Measures**

The rules relating to the protection of technological measures have been integrated in the Part of the CPI that deals with the sanctions and remedies, mainly by the new Articles L. 331-5 to 331-10. It is explicitly provided that the legal protection of technological measures does not apply to software. Article L. 331-5 CPI deals with the

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<sup>216</sup> See above, XB.IV, p. 211.

protection of technological protection measures concerning copyright and related rights. Article L. 342-3 CPI deals with the protection of technological protection measures concerning the database *sui generis* right.

The legislator has introduced a sector specific exception for purposes of achieving interoperability in Article L. 331-5 CPI. The provision is attached to the definition of technological protection measures.

Another provision not foreseen under the Directive is contained in Article L. 131-9 CPI, which requires that contracts entered into between producers and authors or performers for the exploitation of their rights, must assert the possibility for the producer to have recourse to TPM or RMI and the pursued objective for each mode of exploitation. The author or performer will also have access to the essential features of those TM or RMI. Only the exploitation contracts concluded after the entry in force of the law are covered. This provision aims at preventing the use of TM in the exploitation of works without the authorisation or information of the author.

## **I. *Definition***

The definition of technological measures has been copied from the Directive. Article L. 331-5 states that a technological measure is "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict uses not authorised by the right holder of any copyright or any right related to copyright, in respect of works or performances".

Technological measures are presumed to be "effective" where the use of a protected work or performance is controlled through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective."

The law explicitly states that the software is not protected by these new provisions.

The law adds that a protocol, a format, a method of encryption, scrambling or any other transformation of the object of the protection is not in itself a technological measure protected by the law. This precision did not appear in the directive and its sense is not very clear. It probably means that the method on which the technological measure is based is not protected, independently of the technological measure used to protect copyrighted works. This addition aimed at reassuring the open source movement.

The French lawmaker has added an interesting feature to the legal protection of technological measure. It concerns the need for interoperability of those measures. The new provision appears in Article L. 331-5 related to the definition of the protected technological measures. It says that the technological measures shall not have as effect to prevent the effective operation of interoperability, in the respect of the copyright but, foremost, it obliges the providers of technological measures to give access to the

information needed to achieve interoperability. That information is defined as the technical documentation and interfaces needed to obtain, in an open standard, a copy of a technically protected work and a copy of information in an electronic form accompanying this work. The new Authority of Regulation of Technological measures (mentioned here above for exceptions) is in charge of mediating the interests of concerned parties. Any software publisher, technological measure conceiver or service provider can ask the Authority of Regulation to ensure the interoperability if the provider of the technological measure does refuse to give access to the relevant information.

The law also states that "the publication of the source code and technical documentation of an independent software interoperable with a TM for lawful purposes can be prohibited by the TM provider only if it proves that this publication would gravely affect the security of the TM". The Authority can issue injunction with pecuniary sanctions if not complied with and can also seize the Competition authorities if needed.

Following that first adoption by the Assemblée Nationale, Apple has already expressed its difficulty as far as its iPod was concerned. It seems that the intention of the Parliament on that issue, was indeed to prevent MP3 players to have a closed standard that does not allow the playing of MP3 in a different format or the playing of iTunes MP3 on different players. However, the Constitutional Court struck out the exemption of acts carried out for purposes of achieving interoperability<sup>217</sup>. The reason was that such exception was too vague. Instead, the law now foresees a

## **II. *Acts of Circumvention***

Article L. 335-3-1 CPI prohibits the act of circumvention of a technological measure. It states that:

" Is punished by a fine of 3750 euros, the undermining, knowingly, for a purpose other than research, of an effective technological measure (...) in order to alter the protection of a work by decoding, decrypting it or, by any other personal intervention aimed to circumvent, defeat or suppress a mechanism of protection or of control, when this undermining is realised by other means than the use of a technological application, device or component"

This text differs from the directive in many regards. First, it defines the act of circumvention in a rather intricate way. But most importantly, it seems to make the circumvention illegal only when it is carried out without a circumventing device. Therefore, the cases where the circumvention will be unlawful might be very limited. The purpose is to exclude private users of circumvention technologies from liability and

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<sup>217</sup> The precise text is : 'En raison de la définition imprécise de la notion d' "interopérabilité", les références à cette notion figurant aux articles 22 et 23 de la loi déferée, qui exonéraient de responsabilité pénale le contournement des "mesures techniques de protection" voulues par les auteurs et titulaires de droits voisins, ainsi que l'altération des éléments d'information relatifs à leur régime de protection, lorsque de tels actes étaient "réalisés à des fins d'interopérabilité'.

thus to restrict acts of circumvention to professional activities under Article 6 (2) as implemented.

An exception to the unlawfulness of the circumvention has also been provided to exempt acts of circumvention made for a research purpose. The Constitutional Court recently restricted the provision to cryptography research.

### **III. *Dealings in Circumvention Devices***

The transposition of the directive has resulted in a very complicated provision that prohibits the provision or procurement to a third party, knowing to do so, directly or indirectly, means designed or specially adapted for the purpose to undermine an effective technological measure by one of the following ways:

- by manufacturing or importing, for purposes other than research;
- by possessing for sale, lending or rental, by offering to the same ends or by offering to the public in any manner a technical application, device or component;
- by offering a service to this end;
- by inducing the use or by commissioning, conceiving, organising, reproducing, distributing or diffusing an advertisement for one of these devices.

Those acts are sanctioned by a 6-months imprisonment and a fine of 30 000 euros.

This Article differs from the directive in its definition of the illicit circumventing devices. Only the devices designed or specially adapted for circumvention purposes are considered as unlawful, whereas the directive also mentions devices that have only a limited commercially significant purpose or use other than to circumvent, which constitutes a broader criteria. The manufacture or importation of the unlawful devices will be exempted if it carried out in a research purpose.

Article L. 335-3-1 III. CPI also states that the sanction will not apply to acts carried out for the purpose of achieving interoperability or for purposes of computer security.

### **IV. *Limitations and Technological Protection Measures (Article 6 (4) EUCD)***

One alinea of Article L. 331-5 states that the technological measures cannot oppose to the free use of the work within the limitations of the rights provided for by the law or by the rights owners.

The new Article L. 331-6 purports to safeguard the interests of the beneficiaries of the exceptions (and more generally of the users of the works, see below). The concerned exceptions are the private copy, the exception for the illustration of teaching, the exception for the handicapped people and the exception for the libraries.

A new entity, the Authority of Regulation of Technological Measures, will be competent to rule on any conflict between exceptions and technological measures. It has the general competence to ensure that the exceptions will be preserved. It can namely determine the way the exercises should be considered by the technological measure, as the number of copies that should be made possible. The rights owners will have to ensure that the effective benefit of the exceptions is still allowed by the technological measures. The benefit of this provision can be limited to the users having a lawful access to works and is not applicable to the works made available on demand, as provided by the directive.

The French law adds that it can be decided by the Authority or the rights owners that these measures only apply to the extent that the exception complies with the three-step test. It is worthwhile to note that the recent decision of the Court of Cassation in the case of a technological measure preventing the copy of a DVD, has also applied the three-step test to the possibility to claim the benefit of the exception when impeded by the presence of a technical lock.

Any beneficiary of an exception can seize the Authority of Regulation which should facilitate a conciliation between parties.

When a case has been referred to the Authority, it has two months to state. The result of the litigation can be either a conciliation or an injunction addressed to the right owners (that can be accompanied by a penalty).

The same Article also provides that the technological measures put in place by producers and distributors of television services shall not inhibit the benefit of the private copy and entrust the High Audiovisual Council to monitor the compliance with that obligation. This can be considered as another application of Article 6(4)(2) of the directive to a specific sector. The user should be made aware of the conditions of access to the playing of a work and the limitations that the technological measure have on the benefit of the private copy.

There is no rule in French law that makes the exceptions imperative. There is no case law either in that direction. In the Mulholland Drive case, a consumer having bought a DVD of Mulholland Drive wanted to make an analogue private copy to show the film to his parents. The presence of a 'TM' on the DVD prevented him to do so. With a consumers' association he sued the right owners and distributors of the DVD. The Court of Appeal in 2005 enjoined the latter to make the consumer benefit from the private copying exception. The private copy was not considered as a right, but the court said that as it was an exception, the copyright owner could not prevent its enjoyment. The judge enjoined the right owners not to sell DVD protected with TM that prevent the making of a private copy. The discussion also dealt with the compatibility of the exception with the 3-step test. In February 2006, the Court de Cassation reversed that decision by affirming that the private copying exception was not compliant with the 3-step test. The reasoning of the Court of cassation is a bit complex and unclear on that point. It seems that its main argument is the following: by enjoining the right holders not to sell unprotected DVD, it would harm the normal exploitation of the work. Rather

than the private copy being contrary to the test, it appears that the court held that the remedy enjoined by the court of appeal to safeguard the private copy was contrary to the three step test.

The last paragraph of Article L. 331-6 CPI adds that any limitation of the playability of a work, a videogram or a phonogram, or any limitation of the benefit of the exceptions of private copy or for disabled person, shall be indicated to the user. That information obligation was already imposed by the case law prior to the transposition.

## **E. Rights Management Information**

The protection of rights management information has been transposed in the new Articles L. 331-10 (definition), 335-3-2 (prohibited activities). Article L. 335-4-2 CPI deals with the prohibition related to RMI concerning related rights. Article L. 342-3-2 CPI deals with the prohibition related to RMI concerning the database sui generis right.

The definition of the RMI is similar to that of Article 7 of the directive. It excludes the software of its scope of application.

The protection of the RMI is slightly different from the directive. Indeed, Article 335-3-2 prohibits: the suppression or modification of the information on the rights management, for the purpose of infringing a copyright, of hiding or facilitating such an infringement. As in the protection of TM, that removal or modification will only take place when it is accomplished by a personal intervention and without the aid of a technological application, device or component. That reduces greatly the scope of the prohibition laid down in the Directive; the provision of means specially designed or adapted to suppress or modify such rights management information. The prohibited activities are similar to those mentioned for TM (manufacture, importation, possession, making available, performing a service, or making an advertisement). That is an extension of the protection, compared to the directive that does not require to prohibit the distribution of RMI-suppression devices. Finally, the importation, distribution, the making available to the public in any manner, of a work whose RMI has been removed. That is similar to the directive.

Conversely, such activities are allowed when they purport to achieve research, interoperability or computer security.

## **F. Sanctions**

No specific sanctions have been introduced except for P2P file sharing. P2P was the hottest issue during the implementation. In December 2005, the opposition, helped with some right-wing MPs had managed to vote an amendment authorising the sharing of musical works through P2P networks in the frame of a compulsory license scheme. However, and following the outrage of the music industry and of the government, that modification of the bill was eventually suppressed.

What is now appearing in the law concerning the P2P sharing is the following: Article L. 335-2 CPI now sanctions (by 3 years imprisonment and a fine of 300.000 €) the publishing, making available and communicating to the public, in any manner, of a device manifestly aimed at making available protected works without authorisation, as well as the inducement, through advertisement, to use such a device. The software used for collaborative work, research or uncopyrighted files or objects was initially not covered by this. The final text following the decision by the Constitutional Court has deleted that provision on the ground that the meaning of ‘collaborative work’ was too vague.

The initial concept to reduce the sanction ranging from € 38 to € 78 was found to be unconstitutional for violating the principle of equal treatment. Now, the general copyright sanctions apply. It appears that, as noted, only active participation in illegal file sharing networks is covered.

Article L. 336-1 CPI gives competence to the president of the *tribunal de grande instance* to enjoin to the publisher of software manifestly used on a commercial scale for sharing works, to take any measure necessary to protect the copyright in those works. Access providers will be obliged to address to their users messages about the dangers of the downloading and making available of protected works. Six months after the enactment of the law, the Government will address a report to the Parliament about the possibilities to set up a public downloading platform for making available works of young creators that are not available on commercial legal platforms.

In case of violation of technological protection measures and rights management information the usual sanctions apply, i.e. the devices enabling the circumvention of a TM or the suppression of an RMI can be seized, as well as the financial benefits arising from them; the personal act of circumvention of a TPM or the suppression of an RMI are criminally sanctioned by a fine of 3750 €; the provision of TM-circumvention or RMI-suppression devices is criminally sanctioned by an imprisonment of 6 months and a fine of 30 000 €. All other remedies have been extended to cover TPM- and RMI-related offences.

## **G. Conclusion**

Major disparities appear in the legal protection of technological protection measures and rights management information, especially concerning the carve out solution for research purposes which is unique. By the transposition bill, the French lawmaker has also extended the obligation to make a deposit of works to dedicated organisms and libraries, namely to websites, software and databases. Such deposit is not a prerequisite for copyright protection but its default is a criminal offence.



## XI GERMANY

The German transposition was completed in 2003 with regard to most provisions. The amended Act containing the provisions of the Directive is in force since 13 September 2003. The aim of the implementation process was initially, under the first basket, to implement only the mandatory provisions of the Directive and the 1996 WIPO Treaties. Further aspects, in particular the non-mandatory provision on limitations, were partially reserved for later assessment under the second basket, which is due to come into force in 2006 and for which a draft law has been passed in parliament.

The most important issues dealt with under the second basket concern the modification of the levy scheme applied to private copying. Both the first and second basket, over and above the implementation aspects, also aims to adapt copyright contract law, and the second basket will introduce a highly controversial clause on the licensing of unknown future uses.

The implementation process was accompanied by a highly political controversy, during which, unsurprisingly, deviating views were submitted particularly as regards the private copying limitation and its extension to digital copies, new limitations in relation to the making available right and the interaction between limitations and technological protection measures. The government held a number of public consultations with interested parties both during the negotiations on the first and second basket. It sought to accommodate most views and to reach compromises.

### **A. Exclusive Rights**

#### **I. *Reproduction Right***

The reproduction right is contained in § 16 (1). It is defined as the right to make reproductions of a work, regardless of whether permanent or transient, by whatever process and in any form. It was not affected by the implementation but for the inclusion of transient copies. Beneficiaries are authors (§§ 16, 69 c UrhG) and owners of neighbouring rights, which include also right owners not dealt with in the Directive: § 70 (scientific editions), § 71 (previously unpublished works), § 72 (photographers), § 77 (performers), § 81 (organizers of performances), § 85 (phonogram producers), § 87 (1) No. 2 (broadcasting organisations), § 87 b (databases), §§ 94, 95 (film producers).

Prior to implementation, short-lived acts of reproduction were only regarded as an infringement of the reproduction right if they allowed an intensified use of the work. Temporary copies made in computer memory, as well as caching and browsing, were widely considered reproductions; these questions were however disputed. The German Federal Court (BGH) left the question, whether the temporary reproduction of a

computer programme in the RAM was a reproduction in the sense of the Copyright act, unresolved<sup>218</sup>.

## II. *Right of Communication to the Public*

§ 19a implements Article 3. The clarification as to specific online uses was necessary since the scope of the communication right, which was granted under an umbrella clause in § 15 (1), was academically disputed. It was partly believed that the communication right would only cover simultaneous receptions. However, the making available right was recognised by the BGH shortly before the implementation, albeit in an obiter dictum, and conceded that the successive rather than simultaneous reception was sufficient<sup>219</sup>.

There is uncertainty as to whether the right covers only the act of making available in networks or whether it also contains an addition and separate right in any subsequent transmission of protected contents<sup>220</sup>.

## III. *Distribution Right*

A specific right on distribution, including rental and lending, was already part of the Act (§ 17) and not modified. The exhaustion principle is enshrined in § 17 (2). In earlier judgements the BGH applied the exhaustion principle not only to the distribution right, but also to the right of communication to the public; in this case the broadcasting right was concerned<sup>221</sup>. However, in a more recent judgement the BGH took the view in an obiter dictum that the principle of exhaustion only applies to the distribution right<sup>222</sup>. This corresponds with leading academic opinion. However, the BGH accepted that there is a general principle besides the exhaustion rule, according to which goods shall be transferable after first sale with the right owner's consent. According to this general principle, copyright-protected goods may be reproduced in advertisements, despite the fact that there is no exhaustion of the reproduction right<sup>223</sup>.

## B. **Exceptions and limitations**

The German implementation did not change the general system. The most important limitation concerns private uses. Additionally, some sector-specific limitations apply. Most limitations are subject to fair compensation. Therefore, some of the non-mandatory limitations have been implemented under different provisions.

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<sup>218</sup> BGH GRUR 1991, 449 – Betriebssystem II; GRUR 1994, 363, 365 – Holzhandelsprogramm.

<sup>219</sup> BGH GRUR 2003, 958 – Paperboy

<sup>220</sup> For the latter proposition see von Ungern-Sternberg, in: Schricker (ed.), Urheberrecht, Kommentar, § 15 at no. 28 (2<sup>nd</sup> ed. 1999); for the contrary see Hoeren, in: Loewenheim, handbuch des Urheberrechts, § 21 at no. 52, p. 294.

<sup>221</sup> BGH GRUR 1981, 413, 416 – Kabelfernsehen in Abschattungsgebieten

<sup>222</sup> BGH GRUR 2000, 699, 701 – Kabelweitersendung

<sup>223</sup> BGHZ 144, 232 – Parfumflakon

The three step test has not been implemented since the test was deemed to address the legislator only. It is however recognised as an instrument of interpretation in judicature<sup>224</sup>.

### **I. *Transient Copies***

Article 5 (1) EUCD has been implemented in § 44 a, which is formulated as a copyright limitation rather than a general exemption. The provision mirrors Article 5 (1) accurately.

### **II. *Limitations for reproductions on paper or any similar medium***

Reprographic copying is permitted under § 53 (discussed below) and thus the implementation overlaps with Article 5 (2) (a) EUCD. Reprography is not defined but, in general, the law draws a distinction between electronic and other forms of reproduction.

According to § 53 (2) No. 4 a) UrhG, it is permitted to make few reproductions for one's own use of small parts of published works, and of contributions to journals and newspapers. The exception has been limited to those cases, in which either the reproduction is made by reprographic means or in which the use of the copy is only analogous. The clause also refers to digital works for which a fair compensation is to be paid via the levy scheme under §§ 54a ff.

### **III. *Private Copying***

Article 5 (2) (a) and 5 (2) (b) have been partially implemented in the general framework of private copying which deals with both analogue and digital copies. The private copying exception is implemented in § 53 (1). Previously, there was no explicit restriction to natural persons, but the law was construed accordingly.

Technological measures have only to be taken into account with regard to the levy scheme (§ 13 (4) UrhWG).

German law contains a number of limitations falling within the ambit of Article 5 (2) (b) EUCD. § 53 (1) permits the making of private copies by natural persons solely for domestic purposes strictly in the private sphere. § 53 (2) permits the making of singular copies for other own uses, which is slightly wider.

Two significant controversies surrounded both the first and second basket. It was in general doubted whether the private copying limitations should continue at all with respect to digital copying, which was affirmed. The second issues concerns the long standing controversy on online and other distance supply of works. The previous version of § 53 permitted the making of copies by third parties on behalf of the privileged person. The final version (under the second basket) will introduce a half hearted compromise package. A further controversy concerned the relationship between

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<sup>224</sup> cf. BGH GRUR 1999, 707 – Kopienversanddienst

the “right” to make private copies and technological protection measures. The solution was to exclude any such right to circumvent for purposes of private copying.

### **1) Private Copying: Personal and Domestic Use**

§ 53 (1) sets forth a limitation for making private copies by analogue or digital means. § 53 (1) is limited to copies made by natural persons for domestic and personal purposes and thus covers, for instance, the making of a copy from a CD.

According to § 53 (1), copies may be made either by the person fulfilling the requirements or by a third party on behalf of that person. However, the making of digital copies by third parties for commercial gain is prohibited.

Copies made for private purposes must not be made available to the public or otherwise exploited, which initially excludes the use of such copies in file sharing systems (§ 53 (5)).

The issue of digital private copying was taken up again during the preparations to the second basket and will, much to the disgust of the film and music industry, remain as the core principle of German copyright law.

The status of private copying exception is a constant source of varying interpretations. Some commentators perceive it as providing a positive statutory right – in that sense, the purchase of a work in physical form entitles the owner of that copy to make further copies since the net sale price includes a levy. This position is irreconcilable with the history of the private copying exception, which was introduced as a limitation recognising the right of privacy of users and the unenforceability of the reproduction right in private spheres.

### **2) Private Copying: Own Individual Uses**

§ 53 (2) permits a number of acts in relation to own uses which go beyond the private sphere. The provision covers the making of copies for own scientific purposes (§ 53 (2) (1), for inclusion in a personal archive (§ 53 (2) (2), for information about current events (§ 53 (2) (3) and for all other own uses not covered under § 53 (1) or § 53 (2) (1-3). The limitations under § 53 (2) are not restricted to non-commercial uses and can be exercised by legal entities.

The scope of § 53 (2) is further restricted in case of copies made for personal archives (which includes archives maintained by legal entities). In this case, the limitations only applies if either the copy is made on paper or a similar medium by photo-mechanical processes, is used only in analogue form or in case the archive does not pursue any direct or indirect commercial purpose. In the latter case, the private copying exception overlaps with Articles 5 (3) (a), 5 (3) (o) and 5 (2) (c) EUCD, and the law was amended so as to bring the archiving limitations in line with all three provisions. The permission to make copies is restricted to internal purposes. Archives are not permitted to make copies for third parties under § 53 (2) (2).

During the process of implementation, the most disputed issue surrounded the permissibility of document delivery services. § 53 (2) permits any entity to make copies on behalf of the privileged person. In contrast to § 53 (1), this also includes – as of now – the making of copies by commercial entities against payment of a charge, provided their service does not exceed a purely mechanical assistance, and any further service (such as a selection of academic articles) will not qualify. This relates to both digital and analogue copies<sup>225</sup>.

This is still a hotly debated topic. Publishers have always disagreed with a construction based upon the agency argument. In 1999, the BGH rendered a decision which held that the agency argument was viable if the copies were supplied from libraries, provided the user was able to rely on § 53 (2) (4) (a) of the previous law, which allowed the making of copies for individual scientific purposes but did not mention copies provided by third parties. The court extended the statutory wording to include an agency type situation in § 53 (2) but confirmed that, in case the copy was transmitted by way of electronic means, a reasonable remuneration had to be paid. This position was then reflected under the new wording of § 53 (2) but continued to be subject to fierce debates, since publishers feared a pre-emption of future markets.

The second basket will introduce a specific limitation dealing with document delivery. According to the new § 53a, the reproduction and transmission of single contributions in newspapers and journals and of small parts of published works is permitted if this is done on request. It is required that the person requesting so can rely on one of the limitations under § 53. The provision is restricted to public libraries and introduces a half hearted compromise package in that delivery must be made only by way of fax, mailing of a hard copy or as a graphic file. Other forms of electronic communication are excluded. Most importantly, the limitation is subject to the works mentioned not being made available to members of the public on the basis of contractual agreements. In short, if publishers enable access on the basis of online contracts, this precludes the establishment of such service by public libraries. In effect, this solution will not only predicate fierce debates on the meaning of “graphic file” but there is a clear danger that publishers will be able to reserve markets by charging exorbitant prices in order to maintain the print market. The limitation is further subject to reasonable remuneration.

A copy for private purposes may not be made from an obviously unlawful copy. Under the previous legislation it was disputed whether a private copy must come from a lawful source, which allowed the presumption of the legality of file sharing systems.

#### **IV. *Libraries, Archives, Educational Establishments***

§ 58 (2) UrhG permits the reproduction and distribution of works of art and of photographs in catalogues, which are published by public libraries, museums or educational institutions either in connection with a public exhibition or for the purpose

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<sup>225</sup> cf. Cologne Higher Regional Court (2000) GRUR, 414 – *GRUR/GRUR INT*.

of documentation of a collection. The limitation has been limited to non-commercial uses.

There is no further specific limitation on libraries. The reproduction of works by library archives is safeguarded under § 53 (2) (2). This provision permits the making of copies for inclusion into an 'own' archive; it is restricted to internal collections of all types (not necessarily in libraries). The archive must not be accessible to third parties. The previous limitation has been restricted to reproductions on paper or a similar medium, to situations in which an exclusive analogue use is intended or where the archive is not intended for commercial purposes.

#### **V. *Ephemeral Recordings by Broadcasters***

§ 55 UrhG allows the copying of works by broadcasters for their own broadcasts; the works have to be deleted one month after the first broadcast at the latest, unless they are of an exceptional documentary character and are included in an official archive. In this case, the copyright owner has to be notified.

Reproductions for the archiving of copyrighted material are permitted in general under § 53 (2) No. 2, if the reproduction is made by using a copy in the possession of the person copying. As noted, this was a controversial issue.

#### **VI. *Reproductions made by social institutions***

According to § 47 (1), social institutions such as children's homes may make reproductions of educational broadcasts, which may only be used for educational purposes. They must be deleted by the end of the school years, unless the right owners receive a fair compensation, which is administered by the collecting societies.

#### **VII. *Illustration for teaching or scientific research***

Germany has not implemented Article 5 (3) (a) as such. As far as reprographic and digital copying for private individual research purposes is concerned, § 53 (2) (4) applies. This complies with Article 5 (3) (a) in connection with Article 2. In addition, a new § 52a had been introduced which permits the making available for scientific purposes, which is believed to be comply with Article 5 (3) (a) in connection with Article 3 (1) EUCD<sup>226</sup>.

##### **1) Making available (§ 52 a)**

Instead, a new § 52a was introduced, accompanied by a lively public debate. § 52a permits the making available of works to the public for the purpose of illustration for teaching and, in addition, for scientific research for non-commercial purposes (§ 52 a UrhG). The exception is limited to small parts of works, small works and single contributions to journals and newspapers. The works may only be made available to the

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<sup>226</sup> See above, XIB.III.2), p. 224.

limited group of students or scientist, i.e. access has to be limited by means of a password etc. The exception also permits those reproductions necessary for the making available of works such as scanning or saving on a hard disc. The law makes a distinction between schools (i.e. teaching) for which the purpose of illustration is mandatory, but this is not the case for scientific research. This appears to be in conflict with Article 5 (3) (a) EUCD in that here the illustration requirement seems to refer to both teaching and scientific research.

§ 52 a allows (1) the making available of such parts in the course of teaching and for illustration purposes and (2) the use by making available to persons for their own individual scientific purposes if they are part of a clearly distinguishable group of researchers. This is intended to allow a small research team access to scientific articles etc. but not to disseminate works in a university intranet accessible to all staff and students. The purpose must be non-commercial

Right owners are entitled to receive fair compensation, although it was asserted that the amount of levies violated the three step test in that it would pre-empt the publishers' markets; this is however questionable.

The exception does not cover works designated for school teaching. The making available of a film is only permitted after two years following its first cinema exploitation. According to § 63 (2) UrhG, the source has to be indicated. As this provision was very controversial, its validity has been limited to 31 December 2006 for it to be reviewed (§ 137 k UrhG). It is now envisaged that it continues to apply.

The exception would also have broadly fallen within the ambit of Article 5 (3) (n) EUCD, which was not implemented in the first basket, in that it permits the use over and above dedicated terminals and encompasses other material as well. Instead, the provision allows, for instance, the making available of works to any recipient as long as that person fulfils the requirements of scientific research and is part of a clearly distinguishable group of scientists. Publishers have therefore claimed that the provision undermines their opportunity to exploit works by making them available. This was based on arguments asserting an expropriation of property rights as protected under the constitution, and it was also claimed that the provision violates the three step test by unreasonably prejudicing the economic interests of authors. The legislator has, however, justified the introduction of § 52 a on the basis of the social rationale requirement of property rights under the constitution. The Legal Committee of the German Bundestag has clarified, however, that the legislator has a duty to carefully observe the exercise of the norm and to take action should abusive use ensue. At present, the future of the exception is undecided. The second basket will now introduce a new § 52b which is said to comply with Article 5 (2) (n) EUCD<sup>227</sup>. If § 52a is indeed applied as foreseen, the provision does neither go beyond Article 5 (3) (a) nor does it pre-empt Article 5 (3) (n). Whether § 52a is in disagreement with Article 5 (5) EUCD is another matter but this will

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<sup>227</sup> see below, para XIB.XIX, p. 230

depend upon the fundamental right to scientific freedom as a limitation on copyright in the context of the unreasonableness test under Article 5 (5) EUCD.

## **2) Reproductions by Educational Establishments (§ 53 (2) (3))**

In relation to the private copying defence, the scope of acts permitted has been significantly widened. § 53 (2) (3) now permits any reproduction for uses in schools and other educational establishments, but excludes universities. This permits the copying of small parts of published works by teachers to the amount necessary and solely for the purpose of illustration in teaching. There is no limitation on the type of work that may be copied though school textbook publishers have claimed that textbooks should, in analogy to § 52, be exempt. The disparate treatment of limitations for teaching purposes in relation to both online uses and reproductions causes a gap since the use under § 53 (2) (3) is not expressly restricted to non-commercial purposes, though the provision makes it clear that such use is only permitted in schools and other non-commercial educational establishments. However, § 53 (2) (3) does not require the indication of source, though it is submitted that such requisite complies with Article 5 (2) (n) EUCD. Copies made under § 53 (2) (3) are solely for internal purposes of schools etc. and such internal use will not significantly affect the moral rights of the author.

## **VIII. Disabled People**

§ 45 a UrhG was introduced when implementing the Directive and allows the reproduction of works and the distribution for the benefit of disabled persons. Copyright owners are entitled to a fair compensation, unless only few copies are made.

## **IX. Limitations for the press**

According to § 49 UrhG, broadcasted commentaries and newspaper articles may be reproduced in newspapers and communicated to the public, if they concern current political, economic or religious issues, unless such use has been expressly reserved. If the reproduction concerns not only an overview over short parts of several articles, the author is entitled to a fair compensation, which is collected by the collecting societies. The indication of the author and the source is required (§ 63 (3) UrhG). This provision was not changed during the implementation process. The second basket will introduce a slightly amended version under which the reproduction public display and dissemination of individual broadcast commentaries, individual Articles (including illustration used in that context) in newspapers and other publication which exclusively serve purposes of current news reporting is permitted save where the right owner has clearly prohibited this.

§ 50 UrhG allows the use of works in connection with the reporting of current events by broadcasting institutions and by the press to the extent justified by the informatory purpose. The source has to be identified, § 63 (1) UrhG. § 50 UrhG has been broadened during the implementation process to cover also the reporting of events in digital online-media.



**X. *Quotation for the purpose of criticism or review***

§ 51 UrhG permits the quotation of works, if and to the extent the quotation is justified for the illustration of the content of the quoting work. The source has to be indicated, § 63 UrhG. The wording of § 51 UrhG contains restrictions as to the extent of the quotation and the category of the work quoted. However, as the jurisdiction has interpreted this provision in a broad way, these restrictions are not relevant any more with the one exception of quotations of musical works: If musical works are quoted within another musical work, only few passages may be used. The provision will be modified under the second basket. The new version will restrict the citation right to the reproduction, distribution and public communication (which covers both making available and traditional forms of public performance or broadcasts) for the purpose of quotation and within the limits of the specific purpose of the quotation in question. This covers, expressly but not conclusively, the inclusion of parts of a published work in independent scientific works for purposes of explanation, and to include fragments of a published work in an independent literary

**XI. *Use for the purpose of public security***

§ 45 UrhG, permitting the reproduction and communication to the public of works for use in judicial or administrative proceedings, was not changed.

**XII. *Use of political speeches***

§ 48 UrhG permits the reproduction of political and certain public speeches in newspapers and similar media. The provision was changed in order to cover also speeches made available on the Internet and the reproduction in digital offline-media.

**XIII. *Religious Celebrations***

According to § 46 UrhG, parts of works may be included in collections of works intended for use in ecclesiastical ceremonies. The provision was slightly changed. Furthermore, § 52 (2) allows the public communication of published works during religious ceremonies; this provision was not changed.

**XIV. *Architectural Works***

§ 59 UrhG permits the making of paintings and photographs of works located permanently in public places; the provision was not changed.

**XV. *Incidental inclusion***

§ 57 UrhG has equally not been changed. It permits the inclusion of works if such inclusion is unavoidable.

**XVI.** *Advertising public exhibitions or sale of artistic works*

§ 58 UrhG has been broadened to cover also photographs and the making available of reproductions of works.

**XVII.** *Use for purposes of caricature, parody or pastiche*

Parodies and caricatures are covered by § 24 UrhG permitting the use of an independent work created by free use of another work<sup>228</sup>. This is not a limitation on copyright but presupposes that caricatures etc. do not constitute reproductions or adaptations.

**XVIII.** *Use in connection with demonstration or repair of equipment*

§ 56 UrhG was broadened to cover also equipment for electronic data processing such as monitors and printers and to allow the making available of works.

**XIX.** *Making available for the purpose of research or private study*

Art. 5 (3) (n) has not yet been implemented, but the draft law of 22 March 2006 proposes to introduce such an exception limited to dedicated terminals (§ 52 b UrhG). This will apply to the public display of works in libraries, archives and museums at electronic terminals and without any commercial purpose. Contractual agreements detailing such use will supervene in all cases. The establishments must make such terminals available solely for purposes of research and private study only. Right holders may claim reasonable compensation to be administered by a collecting society. There will thus be a concurrent application of § 52 a and § 52b. The relationship between the two norms is not an easy one, in particular as far as university libraries are concerned.

**XX.** *Uses of 'minor importance'*

§ 60 UrhG, permitting the reproduction and distribution of photographs for non-commercial purposes by the person having ordered the picture, is limited to analogue uses.

The same is true for § 53 (2) No. 1, allowing the reprographic reproduction of one's own copies for including the reproductions into an own archive. This concerns analogue uses only and thus complies with Article 5 (3) (o) EUCD.

**C. Compensation Scheme**

Private copying is subject to levies, §§ 54 ff. UrhG, which is payable for both blank carriers and devices. The compensation is collected by collecting societies. The following are jointly liable for payment and ancillary rights: Producers of devices enabling the making of copies; producers of data carriers; importers of said devices and data carriers; dealers of said devices and data carriers, if the volume of the transactions surmounts

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<sup>228</sup> cf. BGH GRUR 2003, 956 – Gies-Adler

certain thresholds; producers, importers and dealers of photocopying machines; certain operators of photocopying machines, such as schools, universities, public libraries and copy shops.

This scheme, which encompasses levies for acts of individual copying only, is subject to be radically modified under the second basket. Under the new system, the setting levy tariffs will no longer be legislatively conducted. Instead, the parties are free to negotiate terms in relation to tariffs. It is foreseen that a cap will be introduced for certain media, particularly for personal computers.

Accordingly, the new law gives the owner of copyright, in the cases covered under § 53 (1) – (3) a positive claim against manufacturers of devices and media which, by itself or in connection with other devices, permit the making of reproductions. The claim is based on reasonable compensation, which, in accordance with § 54a is to be determined according to the actual amount of copies typically made, i.e. the tariffs depend upon the real scope in which such devices are used for making reproductions. The use of technological protection measures must be recognized. In addition to manufacturers, importers, traders and owners of certain establishments such as copy shops are jointly liable, §§ 54b – 54c.

Those claims must be administered by a collecting society. Each author has a claim to a fair share of the compensation. In case technological protection measures have been applied, no such claim can be invoked.

## **D. TECHNOLOGICAL PROTECTION MEASURES**

Germany implemented the provisions on technological protection measures in §§ 95a, 95 b UrhG. Article 6 (1) and Article 6 (2) have been implemented with minor deviations. The Act makes it clear that the circumvention of technological protection measures, as such, incurs liability. § 95 a (1) establishes a general prohibition on acts of circumventions of technological protection measures, which are defined in § 95 a (2). § 95 b concerns the interaction between technological protection measures and limitations. This implements Article 6 (4) EUCD

In addition, the German Act has inserted an obligation of right owners to sufficiently and clearly mark products to which technological protection measures have been applied (§ 95 d). The provision is based on principles on consumer protection and unfair competition, in that disguised technological protection measures are misleading. Unless such indication is applied, a purchased copy is a faulty product.

### **I. *Acts of Circumvention***

§ 95 a (1) contains a general prohibition on circumventing effective technological protection measures. The implementation does not depart from the wording of the Directive but has already spawned a considerable amount of scholarly writing.

Faithfully following Article 6 (1) EUCD, § 95a prohibits acts of circumvention of effective technological protection measures if the person doing so knew or had, under the circumstances, sufficient reason to believe that the act of circumvention is carried out in order to enable access or use of a work protected under the Authors Right Act 1965. There are slight deviations from Article 6 (1). The provision expressly restricts the scope of protection to works covered by the Act, though computer programs (protected under a specific chapter of the Act in §§ 69a – 69g) are not covered. The intentional element refers, in contrast to Article 6 (1) to the purpose of accessing and using works rather than to the act of circumvention as such. It is uncertain whether this is truly a deviation from Article 6 (1) EUCD. Article 6 (1) does not elucidate whether protection is granted against the act or against the subsequent use of protected material, and therefore member states have a certain degree of freedom.

### 1) Legal Nature of Circumvention Offences

The doctrinal characterization of acts of circumvention is not entirely clear under § 95a. The parliamentary records and subsequent judicial decisions have established a characterisation as an accompanying right related to copyright rather than a neighbouring right (*Leistungsschutzrecht*), and have also indicated that the rationale for protecting technological protection measures lies in preventing a subsequent exploitation of author's rights, i.e. the person circumventing must do so in order to use the work in an otherwise infringing sense. Hence, the right is not of an absolute proprietary nature but an additional right to enforce rights protected under copyright law. This would allow the inference that acts which circumvent technologies in order to view, for instance, a DVD, would not fall within the ambit of § 95a. Most commentators have, however, taken the view that the act of circumvention would amount to a tort in its own right. The final text does indeed prohibit circumvention of technological protection measures for purposes of access and use of protected works etc. Thereby, whilst some nexus to copyright exists which reduces the scope of § 95a to protected works, the fact that the technology in question is applied to such work would be sufficient at least to obtain an estoppel order. Conversely, the language of § 95a may be construed so as to refer to acts which subsequently constitute an infringement of protected economic rights, such as uploading, downloading or making available. In that sense, “use” means an infringing use<sup>229</sup>.

### 2) Use and Access Technologies

However, § 95a draws a distinction between access and use control mechanisms. The term exploitation (“*Verwertung*”) is not referred to in relation to access control technologies. This makes it difficult to delineate the scope of access protection. Arguably, circumvention of access control mechanisms would incur liability irrespective of any subsequent infringement, save where the information thus protected does not constitute a work. Provided that the aim of § 95a is to afford protection to copyright, it

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<sup>229</sup> Cf. U. Loewenheim/ A. Peukert, *Handbuch des Urheberrechts* (Munich: C.H. Beck 2003), § 34 at no. 3.

conversely appears that a minimum requirement needs to be established with a view to restricting such acts to such ensuing in infringement. But naturally, circumventing access controls will allow both infringing and non-infringing uses. The true effect then is a practical prohibition on circumvention technologies permitting access, so that in case of regional DVD encoding the potential to subsequently use the work in an infringing fashion will be sufficient.

In case of circumventing copy control mechanisms, the subsequent use will be infringing if a portion of the work is copied that represents a “personal intellectual creation”. In most cases this will be facilitated because digital uses result in temporary copies. Acts of circumvention which are carried out by circumventing access control technologies (i.e. in order to read an encrypted e-book) will thus incur liability because (1) circumventing encryption technology constitutes a tort under § 95a and (2) because the subsequent reading of such work presupposes the making of a temporary copy which is not excluded under Article 5 (1) EUCD and § 44a respectively. In this case, circumvention constitutes a tort irrespective of whether the encryption technology is classified as use or access control technology. If no access control technology is in place, the circumvention of technological protection measures restricting the use of works will constitute an offence only if an infringing use follows. This is arguably so in case of regional DVD encodings, provided that such encoding is classified as copy rather access control, though this is debatable because such encoding simultaneously restricts access to the work if played on unsuitable media. The distinction between access and use mechanisms, under the solution reached in Germany, will then force courts to draw artificial distinctions as to when a technology bars access or use.

The circumvention of technological protection measures for accessing a work in order to undertake a non-infringing use would then constitute a tort (though not a criminal offence). This is contradictory since, under general copyright law, the use of a work as such is not covered, and infringement of exclusive rights can only be established once a part representing a personal intellectual creation has been reproduced. This is not the case, for instance, if a user accesses a database or other functional work in order to solely gain access to non-protected data save where this amounts to an infringement of the database maker right (i.e. a substantial part is taken). The rationale of protection is thus difficult to reconcile with basic copyright principles in that technological protection measures may protect against non-infringing uses or may protect non-protected material on the sole ground of it being included in a protectable structure. This deficit has its roots in the expansive language of Article 6 (1) EUCD.

### **3) Protected Technologies**

The types of technologies that qualify relate to both access and use controls, and the term “circumvention” has been defined as any act by which technological protection measures are manipulated or rendered unusable. This covers all types of activities which are intended to lead to an exploitation of copyright works, and in that sense § 95 a does not protect against acts which relate to non-copyright material. The parliamentary records also state that technological protection measures that are solely used to create

artificial barriers to market entry will not be protected (BT-Drucks. 15/38, p. 26), though this position is not expressly referred to in the statutory text. The meaning of the term 'technology' has been discussed in relation to two problematic concerns. First, in relation to fault correction in case of audio CD's, in which case circumvention is necessary in order to recover lost data rather than to manipulate them (and a number of computer programs are supplied which effect this). It is submitted that this position is correct at least in cases where such CD is faulty within the meaning of general civil law, and more generally by virtue of the apparent nexus with copyright exploitation. The central concern then would be whether the purchaser of such carrier can rely on an implied consent. That consent must be expressed either by the right holder or by the seller on his behalf. Because such consent would have to be construed as an implicit obligation arising from the contract in relation to the purchase, that perception will lead to difficulties because the purchaser does not immediately contract with the right owner. It would also depend upon a clear assessment as to whether copy protection devices applied to digital carriers render the goods purchased faulty at all, a question still debated. Likewise, doubts have been raised with respect to scenarios in which the protection measure is not technically circumvented but technically reproduced. Again, this largely depends on whether § 95a indeed prohibits the use of works for non-infringing (rather than exploiting) acts. There is no obvious indication under § 95a that the technology used must, as such, be manipulated or removed. But the position is doubtful in that it refers to any act that enables the exploitation of a work. The knowledge of the person circumventing thus must be directed towards circumventing rather than primarily using a work. Likewise, Article 6 (1) EUCD refers to the objective of circumventing technological protection measures. Technological protection measures that are merely reproduced without an active contribution do neither cause exploitation nor does the average user intentionally circumvent in order to gain access. The weakness of that argument further lies in extending the notion of "circumvention" over and above an active act. There are serious concerns whether such construction, which will ultimately allow right holders to divide markets for exceedingly specific purposes, is proportional.

#### **4) Consent**

Technological protection measures may be circumvented in case the right holder has consented. Reliance upon a limitation (§§ 44a – 63) does not constitute an implicit consent, and beneficiaries are therefore not free to circumvent. This follows the Common Position (OJ 2000 C 344/19). The meaning of consent is understood as initial consent (§ 183 Civil Code) or a subsequent authorization (§ 184 Civil Code). It can only be declared by the right holder. The right to consent is not a licensable right under copyright. Hence, the purchase of a work to which technological protection measures have been applied does not permit a third party purchaser to carry out acts which the right holder had authorized the first purchaser to carry out. This effectively means that technological protection measures surpass the effect of exhaustion.

## 5) Effectiveness

Article 6 (3) (2) EUCD was implemented in § 95 a (2) (2). Effective technological protection measures are defined and encompass all access and use control mechanisms that allow the right holder to control such activities. The provision enumerates certain technologies which the legislator deemed to be effective, such as encryption and distortion or other types of conversion, and all mechanisms for controlling copying (“to keep...under control”) which are suitable for ensuring the objective of the protection rationale of § 95a (1).

The question as to when technological protection measures have the necessary quality to be effective is perceived as a legal rather than technological issue. Technological protection measures may thus be efficient even if it is possible to circumvent (otherwise, legal protection would be obsolete) and the quality of effectiveness is to be assessed from the viewpoint of the average user rather than the technically skilled hacker.

The provision, over and above Article 6 (3) (2) EUCD refers only to such technologies which positively make certain that the rationale of TPM protection is secured. This pertains to the difficulties imposed on an average user, in relation to copy control mechanisms, to circumvent for that purpose. Technological protection measures must, in order to be effective, precisely safeguard against the mode of copying which it intends to prevent, and thus it is insufficient if the technology prevents the making of copies more or less accidentally. The language of § 95a (1) thus evokes a gap in relation to analogue uses not covered by the technological protection measures. Thus, technological protection measures barring digital uses can be circumvented by making analogue copies (for instance, an Audio-CD which contains a copy control mechanisms can be copied on rewritable disks by simply switching the recorder from digital to analogue copying; in this case, the copy is made simply by writing recorded sound onto a CD). In this case, the technological protection measures applied are not effective with regard to analogue uses. It follows that such use cannot be prevented under § 95a (1) and that, as regards the making of analogue copies, the private copying defence (§ 53 (1)) prevails.

## II. *Commercial Dealings in Circumvention Devices*

§ 95 a (2) implements Article 6 (2) EUCD almost exactly. The provision, in line with Directive, protects right holders against the manufacture, import, distribution, sale, rental of anti-circumvention devices as well as against the possession of means, products or parts of products, and the provision of services which are intended to promoting sales, advertisements or marketing for commercial purposes, or which have no significant commercial purpose or use other than to circumvent, or which have been predominantly designed to, manufactured, adapted or offered to assist in the circumvention of effective technological protection measures. The term distribution encompasses not only physical but also non-physical dissemination.

It should be noted that the provision refers to “effective” means and thus the manufacture etc. of devices permitting analogue copies (see above) will not be

prohibited as such unless the technology to be circumvented is specifically designed to prevent the making of analogue copies.

The provision is dogmatically classified as a statutory prohibition on certain preparatory acts. According to the majority opinion in German scholarship, the prohibition exists regardless of whether such technologies are used to infringe copyright or not. The prohibition is directed against the acts enumerated, not against the technology as such. The acts concerned can be committed alternatively.

Unlike in the case of § 95 a (1), § 95 (2) does, therefore, not refer to an infringing use of works but to the quality of such technologies to enable any circumvention as such. Thereby, the prohibition to market etc. circumvention devices is transformed from a mechanisms to protect against preparatory acts to be classified as types of contributory infringement into a type of principle tort and, in addition, a criminal offence. This results in the prohibition of circumvention technologies even if solely employed for non-infringing uses. It appears that this is in line with Article 6 (2) EUCD, which refers to devices which enable the user to circumvent technological protection measures as such, but is hardly reconcilable with the position that § 95 a (1) is dogmatically founded upon protection of works against infringing uses. This position is unpersuasive and results in an inherent contradiction between the two paragraphs of § 95 a. In the majority of member states that follow the Directive's model closely, the prohibition on commercial dealings in circumvention devices is subject to the same interpretation of what constitutes effective technological protection measures in relation to acts of circumvention. Thus, circumvention devices which do not assist in prohibited acts may be commercially supplied, and this depends exclusively upon the scope of application given to Article 6 (1) EUCD. Of course, that scope subsequently depends on whether copyright infringement must ensue or not. In contrast to this, the German solution introduces a prohibition on circumvention which is classified as an act preceding infringement, but which has no further independent legal status in the absence of copyright infringement; conversely, acts which by their very nature are preparatory are prohibited without such condition. This reverses the correlation between the two subparagraphs and renders § 95a (2), in particular as it concerns a criminal act, a primary offence. This allows the inference that further acts of a preparatory or contributory nature can be committed over and above the prohibition as described in § 95a (2). Since the commercial dealing in such devices is prohibited as such, it is unlikely that users will be able to circumvent for non-infringing purposes unless they are technically exceptionally savvy. § 95 a (2), therefore, will pre-empt § 95a (1).

The scope of § 95 a (3) (= Article 6 (2) EUCD) was, for the first time, addressed in a decision by the Cologne Regional Court<sup>230</sup>. The claimant, who sought affirmation against right holders demanding damages for an alleged violation of § 95a (3), asserted that a non-commercial offer of a computer program on an Internet platform permitting the burning of CD's did not violate the provisions on technological protection measures. The software in question was used and had been put on the market before the

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<sup>230</sup> LG Köln, (2006) Jur-PC Web-Dok. 49/2006, Nos. 1-63, available at [www.jur-pc.de](http://www.jur-pc.de).



implementation of § 95a. The claimant merely wished to resell it. The issue was whether offering the technology on an Internet platform constituted both advertising and possessing circumvention technology. The court first held that the meaning of possession under § 95a (3) related to the ‘commercial’ element under § 95 (3) and that possession for private purposes was outside the provision. The court then reasoned that § 95 (3) Copyright Act was not restricted to commercial activities carried out with a view to make profit. It thereby also rejected the argument that the ‘advertising’ was to be understood identically to the wording of Article 2 (1) of the Council Directive on Misleading Advertising, where advertising is defined more narrowly. The court held that the meaning of ‘advertising’ related to any expression facilitating sales, even if this was not associated with a business entity or a general intention to make profit. In addition, the court referred to the rationale of § 95a (3) as a normative provision abstractedly granting protection against any technology facilitating acts of circumvention. It is noteworthy that, thereby, the hypothetical use of the (rather outdated) burner software to be applied to CD’s and other carriers which incorporate copy control mechanisms was sufficient despite the fact that the software had a much wider realm of application. The court did, however, not question nor comprehensively analyse whether the ability to ‘burn’ would have constituted the main purpose of the technology. The decision thus supports the rather generous interpretation of the provision on dealings as a stand-alone provision that has no doctrinal connection with the scope of § 95a (1). It asserts that § 95a (3) incorporates a separate tort of dealing in circumvention devices where, in contrast to § 95a (1), the abstract endangerment of violations of copyright is sufficient. In turn, the court found that, on the basis of constitutional law, the right to prevent and object to the use of circumvention technologies forms part of the constitutional property guarantee as applied to copyright. Most importantly, therefore, the court asserted that § 95a (3) gave any right holders a subjective and individually enforceable right to prevent the use of circumvention devices.

As a further decision by the Munich Higher Regional Court in the “Heise Online” case<sup>231</sup> indicates, a proper dogmatic characterization of the rationale of protecting technological protection measures is not a purely academic matter. The general prohibition on commercial dealings in circumvention devices permitted the court to construe § 95a (2) as a tort for which the concept of disturbance liability applies. The court was thereby in a position to prohibit the defendant the use of a hyperlink referring to a website (in the Caribbean) which offered a device to crack regional DVD encoding despite the fact that the defendant clearly had no own commercial interest, and that the link was used in the context of an online press Article discussing the product. The reasoning avoided discussion of § 95a (1). Relief was granted regardless of the fact that the circumvention of such technologies (in order to enable viewing) is arguably acceptable under § 95a (1). In employing the concept of disturbance liability, which allows the granting of injunctions and estoppel orders against illegitimate activities regardless of fault, the court likewise indicated that it considered § 95a (2) not as a statutorily establishment of certain preparatory acts connected to an infringement of copyright (or at least as an

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<sup>231</sup> OLG München, (2005) (MMR 2005, p. 768, (injunctive relief).

infringement of § 95a (1)). Accordingly, additional activities outside the statutory scope of § 95 a (2) may constitute acts prohibited as contributory or preparatory acts. Arguably, this violates the principle of proportionality as foreseen in Recital 48 EUCD. .

### **III. *Enforcement of Specific Limitations***

Germany made use of Article 6 (4) EUCD in a comparatively restrictive manner. § 95 b implements Article 6 (4) by introducing a limited obligation of right holders who apply technological protection measures to supply certain beneficiaries with the necessary means to make use of certain limitation. The beneficiaries must have lawful access to the works or other subject matter.

The implementation only concerns those limitations specified in Article 6 (4) (4) EUCD. The limitations covered are public security, limitations for the benefit of disabled people, collections for the use in schools and for instruction, broadcasts made for specific educational purposes in schools, and making available for purposes of instruction and research (§ 52 a). In addition, a general self help right for public authorities has expressly been introduced, according to which technological protection measures can be circumvented for purposes of public administration and the judiciary. The right holder applying technological protection measures is additionally obliged to make circumvention tools available for that purpose should such self help not be possible.

In relation to the private use exceptions under § 53, the implementing instrument recognises only those uses which had to be recognised according to Article 6 (4) (1) EUCD, and covers reprographic copying, copies for own research purposes, copies made for purposes of archiving. In relation to other uses falling in the remit of the private use exception, the obligation – in accordance with Article 6 (4) (1) EUCD – only applies with regard to copies made on analogue carriers.

These obligations also apply with respect to protected database makers, although no explicit provision has been made in this regard. It has been asserted that § 95b applies by way of analogy.

#### **1) Obligation to Provide Means for Circumvention**

The obligation only arises with respect to those beneficiaries expressly listed and encompasses limitations in relation to public security and judicial administration, disabled persons, collection for the use in schools and for illustration of teaching, broadcasts for specific educational purposes in schools, making available for research and private study (§ 52a) and reproductions made by broadcasters. Private copying is covered only with respect to certain uses under § 53 (2) and (3), which covers reproduction on paper and similar media, reproductions made for individual scientific purposes, reproductions made for the purpose of archiving, for the purpose of making copies from newspapers for individual information on daily news, for any other individual use covered by § 53 (2) (4), and reproduction made by educational establishments (§ 53 (3)). Article 6 (4) (3) was implemented in § 95a (3).

The right holder is obliged to provide the necessary means. The provision does not detail the type of means but the obligation is restricted to allowing beneficiaries the use only as afforded by the specific limitation. It was envisaged to keep the scope of the obligation open (BT-Drucks. 15/38, p. 27). However, the right to obtain the necessary means in § 95 b (2) is formulated as an enforceable and individual claim in order to secure the exercise of limitations. This excludes a self help right but only to the extent that the circumvention would otherwise be prohibited under § 95a (1). The claim can be enforced collectively. Contractual agreements to the contrary are void, which presupposes that the obligation is not subject to any further negotiation as to terms and conditions.

Beneficiaries must have *lawful* access. Lawfulness, in that sense, immediately follows from the status as beneficiary, i.e. in a situation that would be lawful according to the limitations applying. Therefore, the obligation to supply means does not depend upon the conditions set in individual agreements, and will arise once a work to which technological protection measures have been applied is purchased. In case of online uses, contractual agreements, in line with Article 6 (4) (4) EUCD, supersede any individual obligation. This relates to interactive services only (i.e. unicast services) rather than multicast services. The application of Article 6 (4) (4) in relation to beneficiaries is restricted to the making available act and only applies with regard to permitting access. Therefore, the right to make copies can be enforced despite a contractual agreement to the contrary because § 95 b (3) does not cover subsequent uses, and § 95 b (3) only excludes the obligation as regards the access to the service. § 95b (3) therefore only covers the initial transmission, and the right to make copies is resurrected once access has been granted. There is huge potential for controversy as regards the right to make works available for purposes of research and private study (§ 52a). In this case, the retransmission of works is covered under § 95 b (1), which means that right holders cannot suppress any additional online use such as in university intranets by way of contractual agreement. This position is doubtful. Article 6 (4) (4) is based on the principle of voluntary measures and is not restricted to providing access. Recital 53 asserts that Article 6 (4) (1) and 6 (4) (2) EUCD shall not apply to interactive services as such, which denotes that the use of works transmitted in such way is not subject to that restriction. Accordingly, contractual restrictions on the use of works accessed and downloaded are arguably permitted.

## **2) Private Copying**

Private copying for personal domestic uses (§ 53 (1)) is not covered under § 95 b, primarily because the government took the view that the levy system for private reproductions would still be viable in future and that it will take a considerable length of time until individual licensing schemes for private reproductions will begin to emerge. The alternative would have been to prohibit private copying and replace this with a statutory duty to apply technological protection measures by exploiters, which was rejected specifically for data protection reasons.

The situation is, thereby, complicated by the more general problem of defining the interface between private copying and technological protection measures. German legal scholarship is divided on whether the private copying exception constitutes a right based on freedom of information and/or rights in the property of a purchased carrier or not. The explanatory text to the second basket, however, upholds the traditional view. Accordingly, no right to make private copies can be ascertained. In comparison to other limitations, the private copying defence is not based on any constitutional guarantees as regards freedom of information etc, and neither does it reflect a public policy concerns for ensuring participation in cultural life. It is based on privacy concerns in that enforcement would be disproportionate.

The German Federal Constitutional Court rejected an application for constitutional complaint based on a violation of the rights of owners and a violation of information freedom rights for formal reasons. The Court indicated that a violation of fundamental rights by the right to apply technological protection measures was not persuasive. This follows from the general legislative freedom to inherently define the scope of copyright as a proprietary right, and to that extent, the complainant's rights were not sufficiently affected since he did not indicate that he was practically facing prosecution. However, the Court expressly did not assess the conflict between technological protection measures, copyright and conflicting fundamental rights and the issue was left open<sup>232</sup>

## **E. Rights Management Information**

Article 7 EUCD has been implemented in § 95 c. The provision was first modelled upon the initial EUCD proposal and later amended so as to define infringing acts. The provision is structured into three sub-paragraphs respectively detailing infringement by removal or modification, the term information and acts carried out subsequent to any such removal.

§ 95 c prohibits, in accordance with Article 7, the removal or modification of rights management information applied by the right holder. The term information is understood broadly and covers all information concerning rights management details which have been applied to a copy of a work in electronic form. An infringement is committed once that information is removed or modified. It is immaterial whether this results in infringement of exclusive rights. The modalities of infringement include inducing, enabling, facilitating or disguising the violation of copyright and other subject matter.

Acts carried out following a removal or alteration of rights management information constitutes a tort. The provision prohibits any distribution, import, broadcast, public display, public making available committed without authorisation. An offence is

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<sup>232</sup> BVerfG, MMR 2005, p. 751)

established if committed knowingly, or with sufficient reason to have known, that the purpose is to induce, facilitate etc, infringement of copyright or related rights.

## **F. Sanctions**

Germany has not introduced new sanction for general copyright infringement. Therefore, both civil and criminal sanctions (with respect to commercial dealings) apply, §§ 97 (1), 108 (1).

§ 108 b establishes criminal sanctions for violations of both § 95a and § 95 c. A violation of § 95 a (1) (technological protection measures) and § 95 c (1) (rights management information) is punishable with up to one year imprisonment or a monetary fine. In the case of rights management information, the act must be committed knowingly and without authorization. In both cases, the act must result in an infringement of copyright that must at least be caused negligently. This does not apply if the circumvention of technological protection measures or removal or manipulation of rights management information is carried out solely for private purposes of the perpetrator or for the private purposes of persons privately acquainted.

A violation of § 95 a (2) - commercial dealings in circumvention technologies etc. – carries the same fine.

In case the act is committed under commercial circumstances (i.e. in the course of a business with a view to generate income by repeated acts of infringement), the fine is increased to up to three imprisonment or a monetary fine, § 108b (2). The provision refers to the general qualification for infringement in the course of a business under § 108.

## **G. Conclusion**

Germany has transposed the Directive without any obvious deviations from the Directive. Although the limitations have not been transposed in accordance with their enumeration under Articles (5) (2) and 5 (3) EUCD, the existing and/or amended limitations comply with Article inasmuch as a literal transposition is concerned. The potential deviations are more subtle, in particular in relation to the exception in § 52a. In this case, it may be argued that Article 5 (3) (n) exclusively deals with the making available in libraries, which indirectly encompasses research purposes, and therefore forecloses any further limitations which go beyond that provision. Moreover, if § 52a is based on Article 5 (3) (a), it may be argued that the purpose must be restricted to illustration in university lectures etc. rather than desk research type situations. Article 5 (3) (a) EUCD is not entirely clear on this point but the Common Position indicates that the term “illustration” refers to both school and scientific teaching.

As regards both § 52a and the new § 53 a (online delivery) it may arguably be surmised that those limitations violate the three step test under Article 5 (5) EUCD. It is suggested that this is incorrect. Both provisions aim to balance the reasonable exploitation rights with scientific freedom in order to encourage research. A violation of Article 5 (5)

EUCD can only be established once both limitations go beyond the normal exploitation test. 'Normal exploitation' does not indicate a legislative preference for reserving any conceivable market but must be balanced against the societal concerns pursued. In both cases, the limitation concern special cases for the benefit of scientific freedom. § 53a, in addition, only applies in case such service is not offered by right holders.

As regards Articles 6 and 7 EUCD, the implementation is correct and fully compliant. As regards Article 6 (4) (4) EUCD, the position to permit the enforcement of the limitations mentioned in the case of interactive services is doubtful. It appears that Article 6 (4) (4) excludes contractual agreements for online transmission per se. This would denote that right holders cannot be restrained from imposing conditions subsequent to permitting access. The position in Germany is, however, not entirely clear and awaiting juridical clarification.

## XII GREECE

The Directive was implemented by Article 81 of the Law 3057/2002 entitled «Amendment and Completion of Law 2725/1999, regulation of matters pertaining to the Ministry of Culture and other provisions » (Official Gazette A' 239/10.10.2002). This was a law by the Ministry of Culture, which has the competence for copyright matters. This law modified the basic law 2121/1993 (Official Gazette A' 25/4.3.1993). Greece was the first EU member state that implemented the Directive into its national copyright law.

### **A. Exclusive rights**

Articles 2, 3 and 4 of the Directive were implemented in Article 3 of the existing statutory text, which describes the exclusive economic rights of the author (Law 2121/1993). The implementation was literal and the wording of the Directive did not change.

#### **I. *Reproduction Right***

The beneficiaries of the Right of Reproduction according to Greek Law after the implementation are authors, performers or performing artists (Article 46, 2 b), phonogram producers (Article 47, 1 a), producers of audiovisual works (producers of visual or sound and visual recordings) (Article 47, 2, a), broadcasting organizations (Article 48, 1, d)

There are no divergences concerning the categories of the beneficiaries of the right of reproduction with respect to the Directive. The right of reproduction already existed in a broad form in Greek law. The notion of this right was broad enough to include temporary and ephemeral reproductions. Article 3 of the Law 2121/1993 prior to the implementation provided that the author has the right to permit or prohibit: a) the fixation and reproduction of the work by any means, such as mechanical, photochemical or electronic means.

Although there were not any court decisions on this matter, short-lived acts of reproduction were considered as infringement of the reproduction right by the legal doctrine. However, Greek implementing authorities chose to implement the exact wording of the Directive in order to promote legal certainty. The text after to the implementation is the following: « the author has the right to permit or prohibit: a) the fixation and direct or indirect, temporary or permanent reproduction of their works by any means and in any form, in whole or in part »

## **II. *Communication to the Public***

Non - simultaneous receptions of electronic communications were not recognised directly as acts falling into the author's economic right prior to the implementation of the Directive. However, the existing right of communication of the work to the public (Article 3, e) was broad enough to cover every act of communication of a work to the public conducted in an intangible way. In other words, this right covered every act of communication of the work to the public apart from the distribution of material copies. However, the situation was not clear enough and Greek authorities chose to implement the right of making available. The right of making available is recognised as a special branch of the more general right of communication to the public by wire or wireless or any other means.

A new Article 3 h of the Law 2121/1993 provides that the author has the right to authorize or prohibit the communication to the public of their works, by wire or wireless means or by any other means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. These rights shall not be exhausted by any act of communication to the public as set out in this provision.

## **III. *Distribution Right***

Prior to the implementation, Article 3, (d) of Law 2121/1993 provided that the author has the right to authorize or prohibit the putting to circulation of the original or copies of the work via a transfer of ownership, a rental arrangement or public lending, and, notably with reference to the use of copies, the imposition of limiting conditions on a transfer of ownership or a rental or public lending arrangement

After the implementation, new Article 3 (d) provides that the author has the right to authorise or prohibit, concerning the original or copies of their works, the distribution to the public in any form by sale or otherwise.

Prior to the implementation the legal term describing the right of distribution was « the right of putting the work into circulation». This right included the rights of rental and public lending too. This term was replaced by the term « distribution ». More precisely, according to paragraph 13B of Article 81 of the Law 3057 /2002 « In Law 2121/1993, as exists, and specifically in Articles 33 par. 1 and 6, 66 par. 5, where the terms "circulation" and "circulate" appear, they are replaced by the terms "distribution" and "distribute". » Moreover, now the rights of rental and of public lending are distinct separate rights.

According to Article 3 of Law 2121/1993, the economic right shall confer upon the author notably the power to permit or prohibit:...: d) the distribution of the original or copies of the work via a transfer of ownership, a rental arrangement or public lending, and, notably with reference to the use of copies, the imposition of limiting conditions on a transfer of ownership or a rental or public lending arrangement, etc.



According to Article 15. 1, the transfer of the economic right and the exploitation contracts or the contracts licensing the exploitation of that right may be restrictive as regards the powers they confer, their scope and duration, the place of their validity and the extent or the means of exploitation.

Consequently, the author has the right to impose restrictions on the exploitation of the work through transfer of ownership or a rental or public lending arrangement (in the relevant contract). Moreover, the contract can refer to specific kinds of exploitation of an economic right that could possibly refer to different markets (for example exploitation by printing only in paper form or for a specific type of edition, e.g. in books with a small format (*livres de poche*) etc

Prior to the implementation, the rule of exhaustion was partially accepted by legal doctrine and it was not recognised directly by the law in a general way (the exhaustion rule existed only for software and databases). According to the new Article 3(d), the distribution right shall be exhausted within the Community only where the first sale or other transfer of ownership in the Community of the original or copies is made by the right holder or with his consent. Exhaustion does not extend to non-physical transactions, but refers only to the first sale or other transfer of ownership of the original or the physical copies of the work. The rights of rental and of communication to the public are not exhausted.

## **B. Exceptions and Limitations**

### **I. *Transient Copies***

Article 5(1) of the Directive was implemented in a literal way in the new Article 28B of Law 2121/1993. It is formulated as a new copyright exception and more specifically as an exception from the reproduction right. There was not any existing limitation that caused any problem to the implementation of Article 5(1). Article 28B literally transposes Article 5 (1) EUCD.

### **II. *Reprography***

This limitation did not exist in Greek copyright law and was not implemented. Only private reproduction on paper is covered by Article 18 (reproduction for private use) and not reproduction on paper or any similar medium in general eventually for other uses than private. The private copying exception has already existed Article 18, par. 1 (reproduction for private use) provided that:

“Without prejudice to the provisions laid down in the following paragraphs, it shall be permissible for a person to make a reproduction of a lawfully published work for his own private use, without the consent of the author and without payment. The term «private use» shall not include use by an enterprise, a service or an organization”.

The existing exception was considered to comply with Article 5(2) of the Directive and therefore the existing text was not modified. However, it does not refer expressly to the

condition that the reproduction should not be for ends that are neither directly or indirectly commercial and there is no express requirement to take into the application of technological measures into account as in the Directive. Private copying is subject to a levy.

### **III. *Private Copying***

The limitation of reproduction for private use already existed (Article 18 of Law 2121/1993). Therefore, Greek authorities did not change the existing Article which was considered to be in conformity. The existing limitation (Article 18) does not include an express restriction in relation to natural persons. However, it can be implied from the wording of the text that it concerns natural persons. According to the text of Article 18, copying is permitted only for the private use of the person who makes the reproduction, and the term «private use» shall not include use by an enterprise, a service or an organization.

Given that the existing Article 18 has not changed, there is no express requirement to take into the application of technological measures into account.

### **IV. *Libraries, museums and archives***

Limitations of this kind have already existed in Greek copyright law. These were the limitations provided by Articles 22 (reproduction by libraries and archives) and 23 (reproduction of cinematographic works). These limitations are provided only for special non commercial uses, such as the preservation and protection of rare works. The wording of these limitations has not changed due to the implementation.

Article 22 provides that : “It shall be permissible, without the consent of the author and without payment, for a non-profit-making library or archive to reproduce one additional copy from a copy of the work already in their permanent collection, for the purpose of retaining that additional copy or of transferring it to another non-profit-making library or archive. The reproduction shall be permissible only if an additional copy cannot be obtained in the market promptly, and on reasonable terms”. Article 23 provides that : “In cases where the holder of the economic right abusively withholds consent for the reproduction of a cinematographic work of special artistic value, for the purpose of preserving it in the National Cinematographic Archive, the reproduction shall be permissible without his consent and without payment, subject to a decision by the Minister of Culture, taken in conformity with the prior opinion of the Cinematography Advisory Council.

### **V. *Teaching and Scientific Research***

There is no general limitation for the purpose of illustration for teaching or scientific research and it was not been implemented as such into the Greek copyright law. There are some specific limitations concerning educational, teaching or scientific uses of specific categories of works.

Article 21 of Law 2121/1993 (reproduction for teaching purposes) provides that :It shall be permissible, without the consent of the author and without payment, to reproduce Articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art work exclusively for teaching or examination purposes at an educational establishment, in such measure as is compatible with the aforementioned purpose, provided that the reproduction is effected in accordance with fair practice and does not conflict with the normal exploitation. The reproduction must be accompanied by an indication of the source and of the names of the author and the publisher, provided that the said names appear on the source. It covers only acts of reproduction and requires the indication of the source. No fair compensation is provided.

Another limitation justified for educational uses, but not strictly for the purpose of illustration for teaching or scientific research, is the limitation of Article 27 (b) of Law 2121/1993 (public performance or presentation on special occasions). It concerns only the right of public performance and does not require directly the indication of the source. According to this Article, the “public performance or presentation of a work shall be permissible, without the consent of the author and without payment on the following occasions: a)... b) within the framework of staff and pupil or student activities at an educational establishment, provided that the audience is composed exclusively of the aforementioned persons, the parents of the pupils or students, persons responsible for the care of the pupils or students, or persons directly involved in the activities of the establishment”.

## **VI. *Disabled People***

This limitation did not exist in Greek copyright law before the implementation of the Directive. However, prior to the implementation the provisions of general private law concerning the abuse of right could make this limitation acceptable (this is Article 281 of the Greek Civil Code which prohibits the abuse in the exercise of rights). The limitation was implemented to Law 2121/1993. The new Article 28A of Law 2121/1993 as it was modified by Article 81 of Law 3057/2002 provides that : The reproduction of the work is allowed for the benefit of blinds and deaf-mute, for uses which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific disability. By resolution of the Minister of Culture the conditions of application of this provision may be determined as well as the application of this provision for other categories of people with a disability. The limitation concerns only acts of reproduction for the aforementioned purposes (for the benefit of blinds and deaf-mute) and does not cover other acts and specifically acts of public communication of the works.

## **VII. *Current economic, Political or Religious Topics***

Law 2121/1993 contained a specific limitation for information purposes before the implementation of the Directive 2001/29/EC (Article 25 of Law 2121/1993). This regime remained unchanged and no other limitations were introduced by Article 81 of Law 3057/2002. Article 25 provides that: 1. To the extent justified for the particular

purpose, the following acts of reproduction shall be permissible without the consent of the author and without payment: a) for the purpose of reporting current events by the mass media, the reproduction and communication to the public of works seen or heard in the course of the event. This limitation is conforming to the second case covered by Article 5 (3) (c) of the Directive. According to this provision of the Directive, member states can provide that it is permitted the use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the information purpose and as long as the source, including the author's name is indicated, unless this turns out to be impossible. The existing limitation of Article 25 of the Law 2121/1993 covers both acts of reproduction and public communication and it does not require the indication of the source, including the author's name. It can be applied only when reporting current events and not when reporting events or information in general. The notion of current event is not defined by law. However, the existing limitation does not cover acts of reproduction by the press, or communication to the public or making available of published Articles on current economical, political or religious topics or of broadcast works or other subject-matter of the same character (limitation provided in Article 5 (3) (c) first case of the Directive 2001/29/EC). The only acts covered by the existing limitation is the reproduction and communication to the public by mass media of works seen or heard in the course of a current event and does not cover publications of Articles or communication of broadcast works. Although, a similar limitation existed before the promulgation of Law 2121/1993, Greek authorities did not introduce such limitation in Law 2121/1993 and they did not introduce this kind of limitation either by implementing the Directive 2001/29/EC. Consequently, only the second limitation contained in Article 5(3) (c) of the Directive exists in Greek copyright law.

### **VIII.***Quotations*

This limitation existed in Greek copyright law before the implementation of the Directive. No amendments were made to the existing provision due to the implementation. Article 19 of Law 2121/1993 (quotation of extracts) provides that "the quotation of short extracts of a lawfully published work by an author for the purpose of providing support for a case advanced by the person making the quotation or a critique of the position of the author shall be permissible without the consent of the author and without payment, provided that the quotation is compatible with fair practice and that the extent of the extracts do not exceed that justified by the purpose. The quotation of the extract must be accompanied by an indication of the source of the extracts and of the names of the author and of the publisher, provided that the said names appear on the source. This limitation is subject to the following restrictions : a) the quotation has to be compatible with fair practice and that the extent of the extracts do not exceed that justified by the purpose b) The quotation of the extract must be accompanied by an indication of the source of the extracts and of the names of the author and of the publisher, provided that the said names appear on the source.

## **IX. *Public Security***

This limitation already existed (Article 24 of Law 2121/1993) and remained unchanged during the implementation process. More precisely, Article 24 provides that „To the extent justified for a particular purpose, the reproduction of a work for use in the judicial or administrative procedures shall be permitted without the consent of the author and without payment.” It covers only acts of reproduction and not acts of public communication.

## **X. *Speeches, Public Lectures etc.***

This limitation already existed in Article 25 of Law 2121/1993 (reproduction for information purposes). According to this, «to the extent justified for the particular purpose, the following acts of reproduction shall be permissible without the consent of the author and without payment: a) ...b) for the purpose of informing on current events, the reproduction and communication to the public by the mass media of political speeches, addresses, sermons, legal speeches or other works of the same nature, as well as of summaries or extracts of lectures, provided the said works are delivered in public».

## **XI. *Religious or Official Celebrations***

A limitation of this type already existed and it remained unchanged. Article 27 of Law 2121/1993 (public performance or presentation on special occasions) provides that the public performance or presentation of a work shall be permissible, without the consent of the author and without payment on the following occasions: a) at official ceremonies, to the extent compatible with the nature of the ceremonies; it covers only acts of public performance or presentation and no other uses. There is no specific reference to religious celebrations, but the term « official ceremonies » covers religious celebrations.

## **XII. *Architectural Works etc.***

This limitation already existed before the implementation of the Directive and no modifications are made due to the implementation. According to Article 26 of Law 2121/1993 (use of images of works sited in public places), « the occasional reproduction and communication by the mass media of images of architectural works, fine art works, photographs or works of applied art, which are sited permanently in a public place, shall be permissible, without the consent of the author and without payment ». It is more restricted than the relevant provision of the Directive. It covers only acts of occasional and not permanent reproduction and communication by the mass media of images of architectural works, fine art works, photographs or works of applied art which are sited permanently in public places and not use in general.

## **XIII. *Advertising for Public Exhibitions etc.***

This limitation existed before the implementation and remained unchanged (Article 28 of Law 2121/1993). According to this Article, the presentation of a fine art work to the

public, and its reproduction in catalogues to the extent necessary to promote its sale, shall be permissible, without the consent of the author and without payment. Moreover, under Article 28 (3) Copyright Act, the reproduction shall be permissible, provided such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The existing limitation covers specific and well defined uses such as reproductions and presentations to the public and not «use» in general as in the Directive and it is combined with the three steps test (paragraph 3 of Article 28).

#### **XIV. *Caricature and Parody***

There is no express limitation concerning the use of a work for purposes of caricature, parody or pastiche. The use of a work on these purposes could be based theoretically on the right of freedom of communication or press. However, there aren't any court decisions on this matter.

#### **XV. *Reproductions in School Textbooks***

There is one limitation in Greek copyright law which is not included to the catalogue of limitations of the Directive. This is the limitation of Article 20 of the Law 2121/1993 (reproduction in school textbooks and anthologies). This provides that „1. The reproduction of lawfully published literary works of one or more writers in educational textbooks approved for use in the primary and secondary education by the Ministry of National Education and Religions or another competent ministry, according to the official detailed syllabus, shall be permissible without the consent of the authors and without payment. The reproduction shall encompass only a small part of the total output of each of the writers. The provision is applicable only as it concerns the reproduction by means of printing; 2. After the death of the author, it shall be permissible to reproduce his works in a lawfully published anthology of literary works of more than one writer, without the consent of the right holders and without payment. The reproduction shall encompass only a small part of the total output of each of the writers.

This limitation is justified by educational purposes. Its scope is narrow, because it covers reproductions only in educational textbooks for use in the primary and secondary education (and not for use in universities). It can be applied only for a small part of the total output of each of the writers and does not cover digital reproductions of the works (only the reproduction by means of printing). The narrow scope of the application of the limitation and its minor importance justified the conservation of the limitation by application of Article 5.3. of the Directive 2001/29. ( known as the «grand father clause»: use in certain cases of minor importance, where exceptions and limitations already exist and provided that they only concern analogue uses).

However, recently a new law was voted (Law 3328/2005, Official Journal A, 80/1.4.2005) which modifies the content of the existing provisions of Article 20 of the Law 2121/1993. More precisely, according to Article 22 of the Law 3328/2005, it shall

be permissible without the consent of the authors and without payment not only reproductions of lawfully published literary works of one or more writers in educational textbooks approved for use in the primary and secondary education but also reproductions of small parts of works of fine arts such works of painting, pictures or photographs of every nature provided that they are relevant to the content of the educational textbooks.

Moreover, the new provisions permit the reproduction of every educational or teaching material which is approved as such by the Ministry of Education, including educational software, films, CD ROM, DVD, Internet applications and generally every other content which is saved in digital or electronic form. Even these provisions don't refer expressly to the provisions of Article 20 of the Law 2121/1993 (there is no direct reference to Article 20 of the Law 2121/1993 in the provisions or the title of Article 22 of Law 3328/2005), it is evident that they modify and extent the content and the scope of the existing limitation of Article 20 in a way that is contrary to the Directive 2001/29. Article 5.3.o of the Directive permits the eventual maintenance of certain existing limitations provided that they concern only the analogue reproduction and that they have minor importance. This is not the case of the new scope of the limitation of Article 22 of Law 3328/2005, which introduces a broad limitation which in its new form (it clearly concerns digital or electronic reproductions) can not be covered by Article 5 (3) (o). It is a new limitation which is not included by the exhaustive list of Article 5 of the Directive and consequently violates the provisions of the Directive. Moreover, it is evident that it cannot comply with Article 5 (5) EUCD (the new Article 28C of Law 2121/1993).

### **C. Compensation system**

Private copying is subject to a levy and more precisely to fair compensation. The persons who are liable to pay this compensation are the importers or the manufacturers of technical means used for the reproduction, such as visual or sound, or audiovisual recording equipment, equipment either attached or either attachable to the central unit of computers and used exclusively for the digital copying or digital recopying from or towards analogue means (except for the printers), magnetic tapes or other materials, suitable for the reproduction of sounds or images or of sounds and images, including the materials suitable for the digital copying, -such as CD-RW, CD-R, movable optical magnetic discs with stocking capacity more than 100 Mbytes, stocking material/diskettes with stocking capacity less than 100 Mbytes- photocopying machines, photocopy paper. The compensation is fixed at a percentage of the value of the technical means of reproduction (6% or 4%). The compensation is collected by collecting societies acting for all or part of the concerned category of right holders. Since the implementation of the Directive, the situation has not changed.

### **D. Protection of Technological Measures**

The implementing law followed the definition of the Directive. No changes to the wording of the Directive were made. According to new Article 66A of Law 2121/1993 (technological measures) : "1. The expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed

to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as well as the sui generis right of the database maker. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective". (implementing Article 6 (3) EUCD).

#### **I. *The prohibition of acts of circumvention***

Greek authorities implemented the prohibition of acts of circumvention without deviations from the text and wording of the Directive. According to new Article 66A: « ...2. *It is prohibited to circumvent, without the permission of the right holder, any effective technological measure when such act is made in the knowledge or with reasonable grounds to know that he is pursuing that objective* (implementing Article 6 par. 1 of Directive 2001/29).

#### **II. *Dealings in anti circumvention devices***

The provisions about the prohibition of acts dealing in anti circumvention devices of the Directive 2001/29/EC have been implemented in Greek copyright law without any deviations or changes. According to new Article 66A of the Law 2121/1993 : « ...3. It is prohibited without the permission of the right holder, the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: a) are promoted, advertised or marketed for the purpose of circumvention of, or b) have only a limited commercially significant purpose or use other than to circumvent, or c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures (implementing Article 6 par. 2 of Directive 2001/29) ».

#### **III. *Beneficiaries of limitations and technological protection measures (Article 6 (4) EUCD***

The provisions of Article 6 (4) of the Directive were implemented in Greek copyright law and more precisely in paragraph 5 of the new Article 66 A. According to this paragraph, the right holders should have the obligation to give to the beneficiaries the measures to ensure the benefit of the exception to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned as it concerns some of the limitations established in Greek copyright law. The limitations which are chosen correspond to the relevant list of limitations provided in Article 6 (4) of the Directive. This concerns

- h) reproduction for private use on paper or any similar medium (Article 18 of Law 2121/1993). It corresponds to the cases of Article 5 (2) (a) and 5 (2) (b) of the Directive.



- i) reproduction for teaching purposes (Article 21 of Law 2121/1993). It corresponds to the limitation of Article 5 (3) (a) of the Directive.
- j) reproduction by libraries and archives (Article 22 of Law 2121/1993). It corresponds to the limitation of Article 5 (2) (c) of the Directive.
- k) reproduction for judicial or administrative purposes (Article 24 of Law 2121/1993). It corresponds to the limitation of Article 5 (3) (e) of the Directive.
- l) the use for the benefit of people with disability (Article 28A of Law 2121/1993). It corresponds to the limitation of Article 5 (3) (b) of the Directive.

In case the right holders don't take any voluntary measures to ensure that the beneficiaries of these limitations could ensure the benefit of the exception, including agreements between right holders and third parties benefiting from the exception, a special administrative procedure is foreseen. The right holders and third parties benefiting from the exception may request the assistance of one or more mediators selected from the list of mediators drawn up by the Greek Copyright Organization (O.P.I.). The mediators make recommendations to the parties. If no party objects within one month from the forwarding of the recommendation, all parties are considered to have accepted the recommendation. Otherwise, the dispute is settled by the Court of Appeal of Athens trying at first and last instance.

The exact text of paragraph 5 of Article 66A is the following :

« ...5. Notwithstanding the legal protection provided for in par. 2 of this Article, as it concerns the limitations (exceptions) provided for in Section IV of law 2121/1993, as exists, related to reproduction for private use on paper or any similar medium (Article 18), reproduction for teaching purposes (Article 21), reproduction by libraries and archives (Article 22), reproduction for judicial or administrative purposes (Article 24), as well as the use for the benefit of people with disability (Article 28A), the right holders should have the obligation to give to the beneficiaries the measures to ensure the benefit of the exception to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned. If the right holders do not take voluntary measures including agreements between right holders and third parties benefiting from the exception, the right holders and third parties benefiting from the exception may request the assistance of one or more mediators selected from the list of mediators drawn up by the Copyright Organization. The mediators make recommendations to the parties. If no party objects within one month from the forwarding of the recommendation, all parties are considered to have accepted the recommendation. Otherwise, the dispute is settled by the Court of Appeal of Athens trying at first and last instance. These provisions shall not apply to works or other subject-matter available to the public on agreed contractual terms in such a way that

members of the public may access them from a place and at a time individually chosen by them ».(implementing Article 6 par. 4 of Directive 2001/29).

Under Greek copyright law as it has been modified after the implementation, we should distinguish between the limitations which are mentioned in the paragraph 5 of Article 66A of Law 2121/1993 and limitations which are not included in the list of limitations mentioned to this Article. As it has already been analysed, as it concerns the limitations (exceptions) provided for in Section IV of law 2121/1993, as exists, related to reproduction for private use on paper or any similar medium (Article 18), reproduction for teaching purposes (Article 21), reproduction by libraries and archives (Article 22), reproduction for judicial or administrative purposes (Article 24), as well as the use for the benefit of people with disability (Article 28A), the right holders should have the obligation to give to the beneficiaries the measures to ensure the benefit of the exception to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned. Otherwise, the procedure established by the Law should be followed (assistance of mediators etc.).

More generally, limitations to copyright law are mostly considered as exceptions and they are not seen as rights of the users of the works. Freedom of contracts is the general rule in Greek contract law. However, contract provisions must not violate provisions which are *ius cogens*. Are the provisions which establish the limitations to copyright law *jus cogens*? As most of the exceptions are justified by fundamental constitutional rights (for example the freedom of expression, the freedom of art etc), the validity of contractual terms which prohibit their exercise could be seriously compromised. This question has not been answered by the courts or by Greek doctrine. Provided that this issue has not been analysed and judged by courts yet, we there is no clear position..

There are no express provisions in Greek copyright law or Greek consumer law dealing with the relationship between technological measures of protection and limitations or between consumer rights and technological protection measures. However, the application of consumer law or contract law could be asked by the beneficiaries of limitations. There are no court decisions on this matter in Greece and no doctrinal discussion either..

## **E. Rights Management Information**

The provisions of Article 7 of the Directive were implemented without changes in new Article 66B of Law 2121/1993 (Rights - management information). According to this : « 1. The expression "rights management information" means any information provided by right holders which identifies the work or other subject-matter protected by a related right or the sui generis right of database maker, and which identifies the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information. (implementing Article 7 par. 2 of Directive 2001/29).

2. It is prohibited for any person knowingly performing without the permission of the right holder any of the following acts: a) the removal or alteration of any electronic

rights-management information, b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected by a related right or the sui generis right of database maker, from which electronic rights management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or related right or the sui generis right of data base maker ».(implementing Article 7 par. 1 of Directive 2001/29).

The last paragraph of Article 7 (2) of the Directive is not implemented.

## **F. Sanctions**

Specific sanctions were introduced concerning the circumvention of technological measures of protection and the manufacture or disposition of devices or products or the provision of services which are promoted for the purpose of circumvention and the violation of provisions concerning the rights-management information. The sanctions in both cases (which correspond to the violation of Articles 6 and 7 of the Directive) are the same as the provisions concerning copyright infringement as they have been modified by the provisions of Article 81 of Law 3057/2002. These are paragraphs 1 and 2 of Article 66 of Law 2121/1993 : imprisonment of not less than one year and to a fine from 2.900-15.000 Euro for copyright infringement, infringement of rights of performers, infringement of rights of phonogram producers (producers of sound recordings), infringement of rights of producers of audiovisual works (producers of visual or sound and visual recordings), infringement of rights of radio and television organisations. .

There are criminal and civil sanctions. More precisely, according to paragraph 4 of Article 66A (technological measures) : « ...4. The practice of activities in violation of the above provisions is punished by imprisonment of at least one year and a fine of 2.900-15.000 € and entails the civil sanctions of Article 65 Law 2121/1993. The One-member First Instance Court may order injunction in accordance with the Code of Civil Procedure, the provision of Article 64 Law 2121/1993 also being applicable ».

Furthermore, according to Article 66 B (Rights - management information) : « ...3. The violation of the above provisions is punished by imprisonment of at least one year and a fine of 2.900-15.000 Euro and entails the civil sanctions of Article 65 Law 2121/1993. The One-member First Instance Court may order injunction in accordance with the Code of Civil Procedure, the provision of Article 64 Law 2121/1993 also being applicable ».

The remedies provided for either copyright infringement or acts infringing Article 6 and 7 been are the same and there aren't any new types of remedies introduced. The only provisions of Law 2121/1993 concerning the remedies changed were the aforementioned provisions of paragraphs 1 and 2 of Article 66 concerning the criminal sanction of imprisonment of not less than one year and to a fine from 2.900-15.000 Euro for copyright infringement, infringement of rights of performers, infringement of

rights of phonogram producers (producers of sound recordings), infringement of rights of producers of audiovisual works (producers of visual or sound and visual recordings), infringement of rights of radio and television organisations.

However, new provisions are introduced concerning the liability of intermediaries (in accordance with Article 8 (3) of the Directive).

A new Article 64A is added after Article 64 Law 2121/1993 as follows: “Right holders may apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. It is the same for the sui generis right of data base maker.(implementing Article 8, par.3 of Directive 2001/29). This implements Article 8 (3) EUCD.

## **G. Conclusion**

Almost all the existing limitations in Greek copyright law are included in the catalogue of limitations of Article 5 of the Directive (except for the aforementioned limitation of Article 20 of the Law 2121/1993). They don’t present any serious disparities from the limitations of the Directive.

As many of the limitations had already existed and remained unchanged, there are terminological differences. However, these differences are not crucial and they don’t change the meaning or exceed the scope of the limitations of the Directive. The most significant disparity concerns the limitation for reproduction for private use (Article 18 of the Law 2121/1993). Provided that the wording of this limitation did not change, it does not refer expressly to the condition that the reproduction should not be for ends that are neither directly or indirectly commercial and there is no express requirement to take into account the application of technological measures as in the provisions of Article 5 (2) (b) of the Directive.

In addition, the last paragraph of Article 7 (2) of the Directive was not implemented.

## XIII HUNGARY

Hungary adopted the Directive following Act No. CII of 2003, which amended the 1999 Copyright Act (Act No. LXXXVI of 1999, Official Gazette (*Magyar Közlöny*) No. 61) and entered into force on 1 May 2004 (the date of accession).

The new 1999 Act had already included important changes in the Hungarian copyright law. The 2003 amendment brought the law in line with the Directive, apart from a number of provisions which did already form part of the law following earlier amendments to implement the requirements under the WCT and WPPT 1996. The amendments in 2004 concern primarily the adjustment of limitations, especially the required restrictions to non-commercial purposes, and the extension of the exhaustion rule, and have also modified the phrasing of certain provisions implementing the WIPO Treaties.

### A. Exclusive rights

The Hungarian Copyright Act contains all required exclusive rights under Articles 2-4 EUCD. The enumeration of exclusive rights is supported by an umbrella clause which reserves, in general, the author's rights to exploit the work in any tangible or intangible form (Article 16 Copyright Act 1999). The Hungarian Act thus incorporates a rather wide approach to authors' exclusive rights under an open, non-exhaustive list of economic rights.

#### I. *Reproduction Right*

The reproduction right is contained in Article 18 Copyright Act. The provision, in particular and in line with Article 2 EUCD, covers the direct or indirect fixation of the work in any manner, whether permanently or temporarily, and the making of one or several copies of the fixation.

#### II. *Communication to the Public*

Article 26 (8) Copyright Act contains the communication to the public right, which goes back to Article 8 WCT. The right is defined as the right to communicate the work to the public in a manner other than broadcasting or other forms of communication resulting in simultaneous receptions. The making available limb of Article 3 (1) EUCD is reflected in Article 26 (8) which defines the making available as a particular form of communication to the public. The right covers the making available by cable or any other means to members of the public who may access the works from a place and at a time individually chosen by them.

#### III. *Distribution Right*

Article 23 Copyright Act contains the distribution right, formulated as the exclusive right to distribute works and to authorize others to do so. This includes the making works

accessible to the public by putting into circulation or by offering them for putting into circulation. Article 23 (2) Copyright Act specifies the transfer of ownership and the rental of a copy as distribution. Imports are likewise covered. As regards films, works included in phonograms and computer programs, the right of distribution also extends to lending. In the case of works of architecture, works of applied art and industrial designs, the right of rental only applies in relation to the designs thereof.

Article 23 (3) Copyright Act provides that public lending constitutes distribution only with respect to cinematographic creations, works included in sound recordings and software. This is in conflict with Article 2 (1) and 1 (3) of Directive 92/100/EC (Rental and Lending Directive) which provides a lending right – and a remuneration claim – for authors of all works

Article 23 (5) Copyright Act contains the principle of European exhaustion, which has been inserted on the occasion of Hungary's accession to the EU. If the copy of the work has been put into circulation in the European Community by the right holder or by another person expressly authorized by the right holder through sale or the transfer of title of ownership in any other manner, the right of distribution is exhausted with regard to the copy of the work thus put into circulation.

Pursuant to Article 23 (5) Copyright Act, exhaustion does not arise with respect to rental or lending, but, more worryingly, also with respect to importation. This does not restrict the distribution right to a right to object to imports from non member states. The clause also leaves open in how far the right holder might divide licenses and introduce territorial restraints within the Community, and consequentially how this would affect the occurrence of exhaustion. Under a literal interpretation, if the right to control imports is not subject to the exhaustion rule, the right owner is able to divide markets geographically.

## **B. Exceptions and Limitations**

The Hungarian Act was, as noted, modified with respect to limitations as a consequence of implementing the Directive. The enumeration of limitations is preceded by an umbrella clause in Article 33 (1) Copyright Act defining “free uses” as uses which can be made without authorization and without payment of remuneration..

Article 33 (2) Copyright Act contains the three-step test and requires any limitation to comply with the conditions under Article 5 (5) EUCD. In addition, Article 33 (3) Copyright Act directs courts to interpret any limitations in a narrow manner.

Article 83 (2) Copyright Act extends the exceptions and limitations to neighbouring rights.

The limitations are catalogued according to their purpose. The Act first refers to certain forms of private copying, without distinguishing between reprographic and other processes, and then continues with limitations applying to research and private study, copies made in educational establishments, libraries and the like and uses for media

purposes concerning news reporting.

### **I. *Transient Copies***

Article 35 (6) implements Article 5 (1) EUCD verbatim. The previous version provided that the temporary reproduction of a work done with the *exclusive* purpose to realize the use of the work authorized by the owner, or permitted pursuant to the provisions of this Act shall be taken to fall within the scope of free use on the condition that the temporary reproduction is an integral part of the technological process aiming to achieve the said use and lacking any economic significance of its own.

### **II. *Reprography***

The Hungarian Act contains a number of provisions which permit the making of copies by way of reprography which would fall within the ambit of the more restrictive provisions under Article 5 EUCD. Article 21 of Copyright Act transposed Article 5 (2) (a) EUCD. It provides for a right to remuneration for reprographic reproduction both in the form of a levy on copying machines and in the form of a royalty to be paid by copy shops.

### **III. *Private Copying***

Article 35 (1) contains a general private copying privilege for making copies by natural persons. The restriction to natural persons was inserted under Act CII 2003 in order to comply with Article 5 (2) (b) EUCD, though the clause also falls within the remit of Article 5 (2) (a) in that it now applies with respect to reprographic copies. In addition, the private copying exception requires that such use must not serve to generate or increase income, directly or indirectly. In contrast to the Directive, Article 35 (1) thereby restricts the scope of Article 5 (2) (a) EUCD, which is entirely aligned with Article 5 (2) (b) to the effect that digital and reprographic copies are treated equally. This solution results in a more extensive protection afforded to works in analogue format where such protection, in accordance with Recital 38 EUCD, is not necessary.

Thereby, a general private copying exception, as regards copies made on paper etc., in general, is neither permitted for commercial purposes nor for legal entities. However, under Article 35(4) of the Copyright Act, public libraries, museums and archives may make copies for certain non-commercial purposes. It is clarified under Article 35 (3) Copyright Act, that third parties – including the said libraries, museums and archives – are not permitted to make such copies using an electronic medium.

The copy must, in addition, be made for private purposes, which includes the making of copies for purposes exceeding uses in the personal sphere.

Complete books, newspapers and journals are exempt from Article 35 (1) Copyright Act unless transcribed by handwriting or typing, as is the reprographic copying of sheet music.

Most importantly, the private copying exception does not apply with regard to fixations of public performances on phonograms or videograms.

#### **IV. *Libraries, museums and archives***

Publicly accessible libraries and museums, educational establishments and archives may make reproductions of works according to Article 35 (4) Copyright Act. The reproduction must be made in consistence with the objective to be achieved, and must not serve so as to make or increase income.

The establishments mentioned may make reproductions for purposes of scientific research in general. In relation to copies owned, reproductions may be made for scientific purposes or for supply to another library. In the case of books or periodicals, only small parts may be reproduced. In addition, the clause allows further conditions to be introduced under separate law.

#### **V. *Broadcasters***

Article 5 (2) (d) is transposed in Article 35 (7) Copyright Act, which allows broadcasting organisation to make free ephemeral recordings of lawfully acquired works for purposes of their own program. The organization must destroy or delete such recoding within three months unless otherwise agreed. Recordings of an exceptional documentary character may be kept in public archives. In this respect, Hungary maintains a national audiovisual archive (NAVA) which, according to Act No. CXXXVII of 2004, permits the inclusion of any program items. Once those items are fixed by NAVA, they will qualify as being of such exceptional character. This reverses Article 5 (2) (d) EUCD as far as archiving is concerned since the act of fixation in the archive renders the work as exceptional, though Article 5 (2) (d) EUCD does not specify the modes of how member states assess the exceptional character of an item in relation to official archives.

#### **VI. *Social Institutions***

There is no dedicated limitation dealing with social institutions though Article 38 (1) Copyright Act permits works to be performed in institutions for the socially disadvantaged and the aged.

#### **VII. *Teaching and Scientific Research***

Article 34 (2) permits the reproduction of excerpts from published literary and musical works to be incorporated into a work as an illustration for educational purposes and scientific research. In the case of scientific research, the purpose must be non-commercial.

In addition, Article 35 (5) permits, for the use in classrooms, to copy parts of published books or articles from newspapers and other periodicals. The purpose must be educational and is restricted to the number of copies necessary for teaching and examination purposes. The limitation applies to both schools and universities.



### **VIII.** *Disabled People*

Article 41 (1) Copyright Act, consistent with Article 5 (3) (b) EUCD, permits the reproduction and distribution of works for the use of disabled people. The use must be justified by the specific disability.

### **IX.** *Current Events*

The Act exempts the use of works for purposes of reporting current (daily) events under Article 37 (1) Copyright Act. Such use must be justified by its informatory purpose. A requirement of source acknowledgement has been introduced under Act CII 2004. Article 5 (3) (c) EUCD as such was also implemented in an amended Article 36 (2) Copyright Act, according to which news media may communicate to the public and to broadcast published articles on current economic or political topics. In this case, in accordance with Article 5 (3) (c) EUCD, authors of news articles may reserve their rights and the source must, if possible, be indicated. The use of factual information by the media is expressly not protected under the Act. Article 1 (5) Copyright Act explicitly excludes news items and facts for press communication. In this case, the application of Articles 36 and 37 does not arise.

### **X.** *Quotations*

Quotations are permitted according to Article 34 (1) Copyright Act provided that the source is indicated, that the extent of the quotation is justified by the nature and purpose of the use of the work quoted and that it does not modify the quoted work.

### **XI.** *Public Security*

Article 41 (2) Copyright Act permits the use of works for purposes of evidence in judicial, administrative or other official proceedings.

### **XII.** *Speeches, Public Lectures etc.*

The use of political speeches is permitted under the general exception provided for the press and media, and Article 36 (1) exempts the use of political speeches and excerpts from public conferences for informational purposes in general.

### **XIII.** *Religious or Official Celebrations*

In relation to religious celebrations, Article 38 Copyright Act permits the performance of works for non-commercial purposes at such occasions. The same is permitted for performance at celebrations of national holidays.

#### **XIV. *Architectural Works etc.***

Article 68 (1) Copyright Act permits the visualization of works of fine art, architectural and applied art erected permanently outdoors in a public place without authorization and payment of remuneration.

#### **XV. *Incidental Inclusion***

Article 37(2) Copyright Act permits the inclusion of certain works such as works of fine art, architecture, industrial designs and works of applied art for purpose of news reporting if exhibited publicly.

#### **XVI. *Caricature and Parody***

The Hungarian law does not contain a limitation covering quotations as such, and a general free use provision is likewise absent. As far as a parody simultaneously constitutes a quotation, Article 34 (1) Copyright Act will apply. In addition, it may be regarded that a parody or caricature constitutes an infringement of the reproduction right, in the sense that a part of work reflecting an intellectual creation has been used. There is no judicial guidance on the issue, and there is a potential problem due to this, since in the case of limitations the requirement of narrow construction applies.

#### **XVII. *Research or Private Study***

Article 5 (3) (n) EUCD was transposed into Article 38 (5) Copyright Act, and was inserted in the clause dealing with general limitations on communication rights. The provision permits publicly accessible libraries, educational establishments (as defined in Article 33 (4) Copyright Act), museums and archives to use works from their collection for communication to the public or on-demand use on dedicated terminals on the premises of the institution to freely display works forming part of their collection to individual members of the public on screens. The use must be non-commercial in nature and must satisfy the research or private study purposes.

Importantly, Article 38 (5) Copyright Act only applies if contractual agreements have not been entered into. However, in this respect the provision differs from Article 5 (3) (n) in that it simply states that the use is free in the absence of contractual provisions to the contrary, whereas Article 5 (3) (n) EUCD refers to works not subject to purchase or licensing terms, which denotes that the agreement referred to is one concluded between the establishment and the right owner. Under the wording used in Article 38 (5) Copyright Act, the respective agreement may be any agreement preventing such use and may be concluded between authors and exploiters. In addition, the Hungarian text refers to audio and audiovisual archives.

The new Act foresees separate legislation to detail specific conditions of such use in general, and this has been realized under an accompanying decree (117/2004 (IV.28) Gov. Decree). According to the Decree, a library can only use the work if secure means against any alteration, retransmission and copying have been put in place. The scope of

using works as permitted under Article 38 (5) Copyright Act, and the Decree detailing such uses, has been subject to assessment by the Copyright Experts Council<sup>233</sup>. In a case concerning the permissibility of digitization and subsequent use of periodicals in a public library intranet, the Board expressed the view that such use would go beyond Article 5 (3) (n) EUCD. In particular, it considered that the periodicals may be protected by database rights, and then went on to consider the scope of the provision as regards interlinking digital collections. This was a controversial issue under the Hungarian implementation, and the Board concluded that interlinking such collections exceeded the scope prescribed under Article 5 (3) (n) EUCD significantly. The Board also considered whether, alternatively, a library or archive would be permitted to use hyperlinks so as to refer to an intranet established in another beneficiary institution, a possibility indicated in the Decree. The Board rightly took the view that such use no longer complies with the requirement that Article 5 (3) (n) is physically restricted to both works in an existing collection and on the premises. This makes clear that own collection can only be used on the institution's own premises. The position taken under the Decree is also difficult to reconcile with the fact that such process would take away the publishers primary existing market which consists, i.e. selling paper copies of periodicals. However, the issue has not been rectified.

Finally, the reference to the absence of purchase or licensing terms is difficult to bring in line with the requirement under Article 5 (3) (n) as regards the availability of works to be made available. This is primarily a problem of interpreting Article 5 (3) (n) since it is unclear as to which works may be used on in-house terminals.

### **C. Compensation System**

The Hungarian system is largely based on a concept seeking to remunerate right owners for private copying, and remuneration is due in all cases required under Article 5 (2) (a) and (b).

In relation to private copying (recording), Article 20 Copyright Act imposes a levy scheme which is applied to blank carriers (audio and video tapes) and to be paid by manufacturers and importers. The tariffs are negotiated with and fixed by the relevant collecting society (ARTISJUS) and the application of technological protection measures must be taken into account following an amendment of Article 20 under Act CII 2004.

The Copyright Experts Council, in one of its recent findings, has stated that private copying from illegal sources is not allowed under the Hungarian law, since it is in conflict with Article 33(2) of the Copyright Act under which any exception is only allowed if it corresponds to the three-step test as provided in Article 5(5) of the

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<sup>233</sup> [www.hpo.hu/English/hivatalrol/testuletek/szjszt/](http://www.hpo.hu/English/hivatalrol/testuletek/szjszt/)

Directive, and, furthermore, if it corresponds to the requirement of fair practice and the [social-political] objective of the free use.

The Council also stated that the amount of levies do not have to be decreased due to such private copying, and that what may only be justified is to take into account the levy paid on the carrier that has been used for such copying, for the calculation of damages.

As mentioned above, Article 21 Copyright Act institutes a separate remuneration system for authors whose works are subject to reprography, which is based upon both levies, imposed on copying devices (to be paid by manufactures and importers of such devices), and payments made by businesses providing means for making copies.

In addition, the Hungarian system employs an “extended collective licensing” scheme (Articles 27 and 91 (1) Copyright Act) which principally covers agreements between right owners and collecting societies in relation to specific uses to be determined. Thereby, collecting societies may determine whether specific uses are to be authorised, and such authorisation will then cover all works and subject matter to be administered by a registered collecting society. and In particular, the scheme now applies for all rights in relation to musical works, Article 27 (3) Copyright Act. There exist “opt out” possibilities for right owners under certain conditions.

## **D. Protection of Technological Measures**

The Hungarian implementation has inserted Article 6 EUCD both in the Copyright Act and, in relation to commercial dealings, under Article 95 (2) Copyright Act. The provision of acts of circumvention makes it clear that such acts are only covered inasmuch as technological protection measures protect works and other subject matter.

### **I. *Acts of Circumvention***

Article 95 (1) Copyright Act implements Article 6 (1) EUCD. The provisions states that the legal consequences of the infringement of copyright shall apply to the circumvention of any effective technological measures designed to provide protection for copyright, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that the aim of that act is pursuing that objective.

Article 95 (2) Copyright Act defines “technological measures” as any device, component, method or technology that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, which are not authorized by the copyright holder. Technological measures shall be deemed effective where the use of a protected work is controlled by the right holders through application of an access control or protection process, in particular encryption or other transformation of the work or a copy control mechanism, which is suitable to achieve the protection objective.

The Act therefore covers both access and copy control mechanisms.

The wording has been slightly amended. Under the previous formulation, acts of circumvention related to the use of devices etc. which were designed to prevent or hinder infringement of copyright. The current final version is wider. It indicates that an act of circumvention, given the absence of the previous terminology indicating copyright infringement, constitutes a tort if done without authorisation and in cases where the measures are applied in order to prevent any act not authorised. Not only does this give the owner of copyright a rather extensive control, the current formulation will also have effects in relation to voluntary agreements under Article 95A (see below) by providing owners with both protection for the technological protection measures and, on the basis of the status of technological protection measures, with a general right to conclude terms and conditions even where they are not covered by copyright protection.

Article 99 provides that infringement of technological protection measures carries the same sanctions as infringement of copyright.

## **II. *Commercial Dealings in Circumvention Technology***

Article 95 (2) literally transposes Article 6 (2) EUCD. The provision asserts that the legal consequences of the infringement of copyright shall apply to the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

In addition to this, Article 329/B of the Criminal Code establishes criminal sanctions for those committing the acts mentioned. The provision applies to those who manufacture or distribute circumvention devices or who make such technologies available with an intention to make profit. Given that the provision relies on the wide definition of technological protection measures as used in the Copyright Act, the penalty – up two years imprisonment or monetary fine – seems severe. In case the act is carried out as part of a business activity, the penalty increases to three years.

## **III. *Article 6 (4) EUCD (Mediation Procedure)***

The amendment introduces a special mediation procedure in accordance with Art 6 (4) EUCD. The Hungarian solution is thus very dedicatedly based upon voluntary agreements between right holders applying technological protection measures and beneficiaries.

Article 95/A Copyright Act, as introduced, allows beneficiaries to demand that the right holder enables the use provided the beneficiary has lawful access. Article 95/A (2) implements Article 6 (4) (4) and makes it clear that the right to initiate proceedings does not subsist in case of online contracts.

The Hungarian Act provides this for the beneficiaries of reprographic reproduction, use in educational establishments, libraries, museums and archives, for purposes of making ephemeral recordings by broadcasters, for purposes of illustration of teaching, for use by people with a disability and for judicial and administrative procedures.

In the absence of a voluntary agreement between right holders and beneficiaries, mediation procedure is foreseen, and a mediation body is to be established within the Copyright Experts Council. The mediation, statutorily inscribed under Article 105/A Copyright Act, has binding effect once a dispute resolution has been reached, which can be enforced through the courts. The Council may order access or impose certain conditions. If the mediation attempt fails, beneficiaries have access to courts in order to enforce their right, but given the general supremacy of technological protection measures, the outcome of such dispute is uncertain since the Act does not indicate a clear preference. The mediation procedure may also be instigated by representatives of user groups, Article 105/A (2) Copyright Act. Similarly, the decision would then apply to all members which constitute a specific group of beneficiaries, which is likely to cause a number of legal and practical problems.

#### **IV. *Computer Programs***

Articles 95 (1) and (2) do not affect the limitations as regards the making of back-up copies of, and observing and studying, computer programs (Article 59 Copyright Act). The same applies with regard to decompilation by a lawful user. Furthermore, Article 95 (2) shall only apply to the distribution or possession for commercial purposes of any technology, device or component whose sole intended purpose is to facilitate the unauthorized circumvention or removal of a technological measure applied for the protection of the software.

#### **E. Rights Management Information**

Article 7 has been implemented in analogy to Article 6 EUCD, and Article 96 states, accordingly, that the consequences of copyright infringement apply to the unauthorized removal or alteration of the rights management information as well as to the unauthorized distribution, importation for distribution, broadcasting or communication to the public in a different manner of works from which the right management information have been removed or on which such information have been altered without authority, supposing that the person performing any of the acts referred to knows, or with the care expected to obtain in the given situation has reasonable grounds to know, that the acts unlawfully enable or facilitate the infringement of the copyright or induce others to commit such infringement.

Rights management information is defined as all particulars provided by the right holders which identify the work, the author of the work, the owner of any right in the work, or inform about the terms and conditions of the use of the work, including any numbers or codes that represent such information, when such data are attached to a

copy of the work or are made perceptible in connection with the communication of the work to the public.

## **F. Sanctions**

The Copyright Act provides for a number of interim and ultimate means of redress (Article 156 Copyright Act), including damages. Article 3 Copyright Act refers any matters not covered to be dealt with under the Civil Code, which imposes damages for both actual damage and lost income as well as restitution of unjust enrichment. Criminal sanctions are provided under the Criminal Code, which includes a new Article 329/A inserted under the 1999 amendments. The sanctions for infringement with regard to technological protection measures and rights management information are, as noted, the same, but qualified under the Criminal Code.

## **G. Conclusion**

The Hungarian Act, for most parts, faithfully aims to comply with the Directive. Problems can be observed specifically in relation to the implementation of the private copying exception, reproductions made by the national film archive and the suggestion of interlinking library collections.

## XIV IRELAND

Ireland anticipated the implementation of the final Directive with the Copyright Act 2000 as amended. To implement further provisions of the Directive Ireland issued the statutory instrument No. 16/2004 (European Communities (Copyright and Related Rights) Regulations 2004<sup>234</sup>). The statutory instrument is in force since 16 January 2004.

The amendments made in 2004 only concern the implementation of Article 6 (4) as well as minor additions to Article 5 (1) EUCD. In particular, the early transposition of the (then) draft Directive resulted in the continued applicability of most existing limitations since Article 5 (3) EUCD was finalized and agreed subsequently.

### A. Exclusive Rights

#### I. *Reproduction Right*

Sec. 39 Copyright Act contains the reproduction right, which expressly encompasses temporary reproductions. The provisions was significantly updated so as to now include now include the copying of works in electronic form and the storing of works in any medium. The provision thereby encompasses expressly both acts of storing a work in a more durable form (such as in computer memory) as well as transient copies on networks. The right is granted to works, phonogram producers, film producers and broadcasters. The Irish Copyright Act, following the typical structure of systems based upon copyright (rather than *droit d'auteur*) makes no distinction between primary works and entrepreneurial copyrights (Sec. 17 Copyright Act 2000). Performers are granted the same right under Sec. 203 Copyright Act 2000 in connection with Sec. 204 (1) Copyright Act.

#### II. *Right of Communication*

The right of communication to the public has been inserted (in 2000) in sec. 40 Copyright Act. the right is termed, generally, as 'making available' right and includes acts of making available works in an on-demand service. Interestingly, the clause expressly refers to Internet. The right is defined as including the making available of copies of works to members of the public, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of works through the Internet).

The Act does thereby not recognize a specific communication to the public right. Both the 1996 WIPO Treaties and Article 3 EUCD are structured so as to only include the making available as one form of public communication. The effect of the Irish transposition is that certain acts of communication to the public will not come within the ambit of Secs. 39, 204 (1) Copyright Act 2000 if the interactive element, which is

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<sup>234</sup> available under <http://www.entemp.ie/publications/sis/2004/si16.pdf>



both present in relation to the general making available concept and uses on the Internet, is missing. Thereby, the unsolicited and active transmission of a work by e-mail or other such technologies is not covered. In such cases, the right owner will have to rely on the reproduction right.

Unlike the UK, the Irish Copyright Act continues to protect cable programmes under copyright. The person protected is the operator of such program. The protection of 'items included in a cable program' which had led to difficulties in the UK, and was abolished in the process of implementing the Directive, has not been modified in Ireland. Cable program copyright protects the information sent under a cable program service as such. The Act defines a cable program, roughly, as a non-interactive service which sends primarily sounds, images or data by way of a telecommunication service. Since no specific provisions are in place, all economic and moral rights are attributed to the person operating the service. This may lead to undesired results. Under the current structure of the law, the use of works for the purpose of streaming would come within the ambit of the cable program copyright, as would technologies such as Internet broadcast and satellite transmission of Internet content. The effect is that the reception of a cable program, for which a simultaneous reception is not required, may amount to an infringement of copyright in the (otherwise unprotected) content of such program. Therefore, once content is transmitted by wire or other means, and receivable in at least two different places, the question of the 'public' will not arise. The effect of a copyright in the signals themselves (i.e. in the items conveyed) is likely to pre-empt and broadly go beyond the exclusive right of making available for which (1) an interactive element is required and (2) a public must be reached.

The effect of a missing umbrella clause for a general communication right has effects as regards the payment of a statutory license for the public performance of a sound recording. Sec. 38 Copyright Act gives the owner of copyright in a sound recording a specific right to claim remuneration for such public performance (i.e. in bars or restaurants etc.). The provision continues to apply. This is consistent with Article 3 (2) EUCD because the Directive does not deal with instances of simultaneous performances, though it should be noted that Irish law deviates from most other jurisdictions in granting a type of statutory remuneration right.

### **III. *Distribution Right***

The Act provides a distribution right in Sec. 41. The provision also refers to the principle of exhaustion in the European Economic Area rather than the EU. The clause was inserted in 2000 and modelled upon the provision of the Rental and Lending Directive. The right of distribution is defined as the right to issue copies to the public, including the rental and lending of works. Systematically, the distribution right is not annexed to the reproduction right and in that sense is not part of a broader divulgation right. Instead, the Irish transposition addresses the distribution right in the context of the making available right. This is, strictly speaking, in line with the Directive in that a distribution right is granted, but the dogmatic categorisation significantly departs from

the notion of the distribution as a sole standing right independent of a general making available right.

In addition, the transposition of Article 4 EUCD does not clarify the situation as regards the characteristics of a 'copy' put into circulation. Copy means any representation and also applies, for instance, to broadcasts and cable programs. Distribution, as noted, is a sub-category to the making available right under Sec. 40 (1) Copyright Act 2000. The wording used in Sec. 41 (2) Copyright Act 2000 ("putting into circulation copies...") allows the inference that a copy may be a digital representation of a work which is then subject to exhaustion even if no physical carrier is used. This may lead to a situation in which a work communicated by the right owner or under a license is deemed to be put into circulation, and the occurrence of exhaustion will then depend upon the qualification of the contractual relationship between sender and recipient as sale (for which exhaustion occurs) or rental and lending (where it does not). The effect is that, if distribution is perceived as a general act of putting into circulation, this may well apply to certain forms of online uses. However, sec. 40 (1) distinguishes acts of making available on the Internet and making available by way of putting copies into circulation. Thereby, acts which fall within the ambit of the making available right, as understood under Article 3 EUCD, will usually not qualify as distribution provided they can be deemed as interactive.

Finally, it should be noted that the Irish Act defines the requirements for exhaustion to occur as an act done by the right holder or under a license. This departs from the general principle of European exhaustion which relates to all types of initial consent. The effect of the use of the term 'license' is not only that some form of contractual agreement must be present between the right holder and a licensee, but also that the act of providing copies to a licensee does not qualify as putting into circulation. In addition, the term license denotes that exhaustion may only occur if the copy is distributed in accordance with the terms of the license. Given that a copyright owner may, in general, divide a license into further sub-licenses, one effect is that the putting into circulation outside a market as defined in the license agreement does not exhaust the distribution right as regards such copies.

A further uncertainty as regards the right to issue copies to the public relates to the interplay between the occurrence of exhaustion within a distribution chain and the incurrance of liability in cases of secondary acts of infringement such as importing or dealing in infringing copies. Under the current law, the question as to when the right is exhausted has not been addressed by Irish courts. Exhaustion may either occur once the work is placed in the hands of a first licensee as a consequence of its physical disposition, or once it reached the end market. The question is important because under the latter solution acts of importing and dealing infringing will amount to a violation of copyright under the secondary infringement rules whereas under the former it would not due to the early occurrence of exhaustion. The distinction between primary acts and secondary acts of infringement thus causes uncertainties for the free movement of goods because Irish law might hold the importer liable on the basis of dealing in an infringing copy.

## **B. Exceptions and Limitations**

The Copyright Act contains both the mandatory exception under Article 5 (1) EUCD, and a number of other exceptions and limitations. No changes were made to the latter in the 2004 amendments, and existing limitations continue to be applicable regardless of the Directive. Most of these are similar to those enlisted in Articles 5 (2) and 5 (3) EUCD, specifically as regards exceptions for the use of works by libraries and archives, for educational or research purposes, and back-up or lawful copies of computer programs. The Act contains an extensive enumeration of narrowly drafted exceptions (Secs. 49 – 77) which apply to three main areas, i.e. fair dealing for the purposes of research and private study or criticism and review (Secs. 49 – 52), education (Secs. 53 – 58), libraries and archives (Secs. 59 – 69) and public administration (Secs. 60 – 77 Copyright Act). following the tradition of copyright systems, the Act does not recognize a general private copying exception (Article 5 (2) (a) EUCD).

The Copyright Act does not make any distinction between works of authorship and neighbouring rights. In addition to the rights of performers, broadcasters and phonogram producers (rights in sound recording), the exceptions also apply to typographical arrangements of published editions.

The three step test (Article 5 (5) EUCD) has not been implemented. As noted, the law already recognizes, to a significant degree, the reservation of markets to right owners, and a number of statutory clauses refer to a test based upon ‘unreasonable prejudice’ principle. Thereby, the three step test is incorporated in the fair dealing test.

The structure of the Irish Copyright Act as regards limitations and exceptions significantly deviates from the structures found in author’s rights systems. Most of the exceptions permitted under the Directive are dealt with under more wide ranging headings, in particular the defences applying to news reporting, quotations, speeches, reprography, private copying and libraries.

The structure of the Irish copyright law does not exempt specific acts of reproduction. In general, the copyright system establishes a general preference for copyright owners to exploit works on any market. This is precipitated by Sec. 50 (4) Copyright Act 2000. Sec. 50 (4) Copyright Act 2000 makes it a condition that the existence of a licensing scheme excludes the reliance on limitations once such scheme is in place, because in such case the use of works without payment (to be collected by licensing agencies and distributed to authors and owners) would unreasonably prejudice the owner’s market. This makes it difficult to predict the operation of limitations with respect to those envisaged under the Directive. In general, right holders are free to form licensing agencies which can claim compensation for certain uses in as far as the otherwise infringing use of copyright works is concerned. If no such system exists, the person making an otherwise infringing use can rely on statutory limitations. Sec. 50 Copyright Act permits, in general, the fair dealing with a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, or non- electronic original database, for the purposes of research or private study. Fair dealing, as regards the use for research or private study,

means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable programme, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright.

### **I. *Temporary Acts of Reproduction (Article 5 (1) EUCD)***

Sec. 87 (1) Copyright Act implements the mandatory fair dealing exception for temporary acts of reproduction. The 2000 Act included this exception in essence. The 2004 Regulations amended it slightly. According to Sec. 87 (1) Copyright Act 2000, copyright is not infringed by the making of a transient and incidental copy of that work which is technically required for the viewing of or listening to the work by a member of the public to whom a copy of the work is lawfully made available. This provision has been modified and Reg. 3 SI 16/2004 substitutes this with the more permissive wording of Article 5 (1) EUCD. The provision faithfully mirrors the Directive. .

The term 'lawful use' is not defined, though in relation to databases and computer programs it is referring to a use within the constraints of a license. Thereby, acts exempt as part of a network transmission do arguably not include acts done within the realms of an exception, though in such case the first alternative of Article 5 (1) EUCD may apply.

Sec. 87 (2) Copyright Act 2000, strangely, declares any copy made in such circumstances as infringing if used for another purposes. It seems difficult to explain how a transient copy can be used in another way but the clause reflects the general stance of Irish copyright law in that the use of a work covered by an exception does not render such copy legitimate for purposes of secondary infringement.

### **II. *Reprography***

Irish copyright law does not embrace the general concept of private reprographic copying as set forth under Article 5 (2) (a) EUCD. Specific defences in relation to reprography exist for both educational establishments and libraries. In addition, copies can be made for any purpose (including reprographic use) once one of the existing fair dealing defences applies. Thereby, the scope of reprographic copying is much more limited than provided for under Article 5 (2) (b) EUCD in that such use is conditional upon further requirements.

One problem this causes is the issue of remuneration. The Directive makes it a condition that acts of private reprographic copying are subject to fair compensation, but the Irish system does not recognize this as a specific right. Therefore, certain types of reprographic copying are not subject to a remuneration or licensing scheme at all (such as copies made for criticism or review, private study and research and copies made by librarians and archivists) whereas licensing schemes are in place for copies made in schools and by university staff and students. The Irish Copyright Licensing Agency

collects payments on the basis of voluntary commercial practice from such establishments.

### **III. *Private uses***

The Act contains a number of limitations which come roughly within the ambit of a private copying exception though they are more limited in scope. Sec. 101 allows the recording of broadcasts for purposes of time shifting. This is granted to both natural persons and, in excess of that, to certain establishments. Performances may be copied by natural persons for private and domestic uses, Sec. 204 (4) Copyright Act 2000.

### **IV. *Educational Establishments***

Article 5 (2) (c) EUCD is not implemented. Specific and detailed provisions on copying in educational establishments are provided for in Secs. 53 – 58 Copyright Act 2000, which establish, in meticulous detail, the situations in which copies may be made for purposes of instruction. Persons qualified are both those giving and those receiving instructions, and the provisions do not distinguish between analogue and digital copying.

The term ‘educational establishment’ covers primarily schools, not universities. In the latter case, the limitations for librarians and in relation to fair dealing for the purpose of research and private study apply (see below).

Sec. 53 (3) Copyright Act 2000 allows the copying of such works for the purposes of instruction or preparation for instruction. The copy must be made by reprographic processes only. It must be accompanied by ‘sufficient acknowledgement’. Sec. 55 (4) exempts copies of sound recordings, films, broadcasts, cable programmes or original databases in the same way. The limitation does not apply with respect to the database sui generis right and only applies if the copy is made by or on behalf of the person giving or receiving instructions, the copying results in only a single copy being made, and sufficient acknowledgement is made.

Sec. 54 Copyright Act 2000 allows the inclusion of short passages from published works (literary, dramatic or musical work, original database or typographical arrangement of a published edition) intended for use in educational establishments (such as textbooks etc., subject to this being described in the title) for purposes of compiling collections.

Sec. 56 permits schools to make fixations of a broadcast or a cable programme, or a copy of a fixation. This does not apply where a licensing scheme (certified under Sec. 173 Copyright Act 2000) is in place and the person making the copies knew or ought to have been aware of the existence of the licensing scheme.

Sec. 57 permits the making of reprographic copies of passages from literary or dramatic works or typographical arrangements of published editions or original databases which have been lawfully made available to the public provided that no more than five percent of the work is copied. This does not apply where a licensing scheme is in place, though a clause in such agreement prohibiting the copying of a lesser amount is void.

The lending of works by educational establishments is generally free and does not give rise to a claim for compensation.

## **V. *Libraries, Archives***

The Irish Act does not implement Article 5 (2) (c) EUCD as such. Instead, a complex regulatory framework is in place which deals with specific types of uses for the benefit of libraries and archives (Secs. 59 ff. Copyright Act 2000) and, to a more limited extent, educational establishments. These exceptions come both within the ambit of Article 5 (2) (a) and (c).

Before detailed discussion is provided on the content of the library and archive exception in Irish law, a short explanation as to the structure of the confusingly detailed provisions shall follow. With regard to the Directive, the Irish Act only marginally recognises rights to be evoked by libraries and archives in their own right. The making of copies is only permitted if the institution acts on behalf of a person who fulfils the requirements of research and private study, a limitation which comes in the vicinity of Article 5 (2) (b) EUCD. The limitations in relation to copying by librarians for other persons generally do not require that such copy must be made for non-commercial purposes only, which *prima facie* is not in line with Article 5 (2) (c) EUCD. Since the limitations were not specifically amended in 2000 and 2004, commercial research and private studying purposes continue to constitute permitted acts. However, the Irish Act, in relation to copies made by libraries and archives, takes the view that the general right to make to copies is carried out on behalf of a third party who fulfils the research and private study exception requirements, and accordingly this is perceived to imply a non-commercial nature. As will detailed below, the exceptions on research and private study in Secs. 50 Copyright Act 2000 are subject to a test whether the copying unreasonably prejudices the copyright owner's commercial interests. There is a presumption in Irish law that this is the case once a copy is made by a librarian on behalf of a qualified person which does not comply with the conditions of an existing licensing scheme regulating specific uses. Thereby, the Act – rather subtly – introduces a general requirement of non-commercial purposes since this is implicitly contained in the research and private study exception, and, in addition, such use may be made subject to a licensing scheme. It therefore appears that the Irish Act is even less permissive than Article 5 (2) (c) EUCD.

In short, the use of works by libraries and archives is subject to ministerial regulations which may impose specific provisions for different libraries and archives, and the Minister has discretion in applying some or all of the subsequent provisions to different libraries and archives (Secs. 60 – 67 Copyright Act 2000). It should be noted that Secs. 60 – 67 only provide examples of types of limitations and that the entire scheme is largely based upon discretion. The provisions are conditional upon the person requesting copies in that that person must fulfil the requirement of research or private study (see below). Thereby, the Act leaves intact the possibility of online delivery of works. This is because the limitations do not grant a positive right to libraries and archives but perceive such institutions as agents for the supply of works, which requires that the person requesting copies fulfils the requirements under the research and private study exception.

It must be noted, however, that each use is subject to specific regulations to be established by way of ministerial regulation, and that the provisions do therefore not immediately permit the making of copies unless such regulation is in place. This significantly departs from Article 5 (2) (c) EUCD which expressly aims to establish a positive and directly applicable limitations for libraries and archives. It should also be pointed out that the provisions are inapplicable to museums.

Typically, the terms and conditions to be established relate to the conditions that are to be complied with when a librarian or archivist of a prescribed library or prescribed archive makes and supplies a copy of any part of a work which has been lawfully made available to the public to a person requiring a copy and the conditions that are to be complied with when works are supplied to another library. The provisions only relate to lawfully published works.

In addition, libraries are usually permitted to replace works from the permanent collection in order to preserve or replace that work, or in the permanent collection of another prescribed library or prescribed archive;

Sec. 60 Copyright Act 2000 makes it a condition that librarians and archivists must be satisfied as to the status of the person requesting a copy, which requires a declaration by that person that he does so for purposes of research and private study. Otherwise, the copy is treated as infringing. Sec. 61 sets forth further conditions relating to making and supplying a copy of an Article or the contents page in a periodical without infringing any copyright in the Article, the contents page or in any illustrations accompanying the Article or the contents page or in the typographical arrangement. The copy must be used for the purpose of research and private study. According to sec. 62, copies may be made for the purpose of replacing lost, stolen, discarded or destroyed works a librarian or archivist of a prescribed library or prescribed archive may, where the prescribed conditions are complied with, make and supply a copy of part of a work (other than an Article or the contents page in a periodical) which has been lawfully made available to the public without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement. Copies may not be made for more than three persons whose requirements are related to any similar requirement of any other person, sec. 63 Copyright Act 2000. These requirements are defined as similar where the copies are of substantially the same material at approximately the same time and for substantially the same purpose, and the requirements of persons shall be deemed to be related where those persons receive instructions to which the material is relevant at the same time and place. Sec. 64 Copyright Act 2000 permits the supply of copies of lost works to other libraries or archives. The librarian should, however, obtain authorization from the right holder if this is feasible.

Sec. 65 Copyright Act 2000 allows libraries and archives to make copies for additionally preserving or replacing works in order to place that copy in the permanent collection, or to replace a lost or stolen work. This only applies if the work cannot be purchased. Sec. 66 permits regulations for making copies based on a variety of purposes such as security, compiling catalogues, exhibitions in the library or archive etc.

The use of works is coupled with a remuneration scheme as set for the in sec. 40. No such claim exists for the lending of works from libraries.

#### **VI.** *Broadcasters*

Sec. 100 Copyright Act permits the making of or use by an authorized broadcaster or authorized cable programme supervision and service provider, for the purpose of maintaining supervision and control over programs broadcast by them or included by them in a broadcasts and cable programme service, of fixations of those programmes. The same applies to performances (Sec. 253 Copyright Act 2000).

#### **VII.** *Social Institutions*

Sec. 97 Copyright Act 2000 permits the making of copies or public communication for inmates of certain establishments, thus reflecting Article 5 (2) (e) EUCD. This applies, in contrast to the Directive, not with respect to certain social institutions but with respect to the inmates or residents of premises where sleeping accommodation is provided and as part of the amenities provided exclusively or mainly for residents or inmate. Interestingly, this appears to cover hotels and other commercial enterprises. The same applies with respect to performances, Sec. 246 Copyright Act 2000.

#### **VIII.** *Teaching and Scientific Research*

Article 5 (3) (a) EUCD has not been implemented. Instead the existing provisions on limitations for purposes of copying for purposes of instruction partially overlap with the regulatory scope of Article 5 (3) (a) EUCD in that a literary, dramatic, musical or artistic work or a typographical arrangement in education continue to apply, Secs. 53 – 58 Copyright Act 2000. In addition, the research and private study exception (Sec. 50 (1) Copyright Act 2000) partially overlaps with Article 5 (3) (a) EUCD, though in this case acknowledgement is not required. If used for research and private study purposes, the Act makes it clear that any such use is subject to the ‘unreasonable prejudice’ test, Sec. 50 (4) Copyright Act 2000. It follows that right holders who have established a licensing scheme may claim compensation for such use.

In addition, there are a number of other restrictions for teaching and scientific purpose which have been already been addressed with respect to reprographic copying in schools, libraries and archives.

#### **IX.** *Disabled People*

A provision on the use of works for disabled people is contained in Sec. 104 and Sec. 252 Copyright Act (in relation to fixations of performances). These establish a general fair dealing defence which allows the supply of an amended copy. This appears much narrower than the general limitations as foreseen in Article 5 (3) (b) EUCD.



## **X. *Current Economic, Political or Religious Topics***

The Act has not implemented Article 5 (3) (c) EUCD but the limitations broadly falls within the scope of Sec. 51 Copyright Act 2000, which concerns fair dealing for the purpose of criticism or review. Sec. 51 (2) Copyright Act 2000 establishes a general defence for reporting current events, though this is not qualified in relation to the topical coverage. The source must be indicated.

The provision, based on a long standing tradition of a general case law based fair dealing exception, is subject to the restriction that the use of the work must not unreasonably prejudice the copyright owner's economic interests.

## **XI. *Quotations***

The Act does not specify a limitation dealing solely with quotations. The making of quotations will either not infringe copyright provided the extract does not constitute a substantial part of the work, or the person using an extract is able to rely on one the fair dealing exceptions, in particular in the case of criticism or review.

## **XII. *Public Administration***

Provisions partially overlapping with Article 5 (3) (e) EUCD are contained in Secs. 71, 237 Copyright Act 2000 on parliamentary and judicial proceedings, and statutory inquiries may be used without restriction under Secs 72, 238 Copyright Act 2000. In addition, the law provides exceptions relating to information in public records and statutory registers, Secs. 73, 74, 239, 240 Copyright Act 2000).

## **XIII. *Speeches, Public Lectures etc.***

There exists no specific provision mirroring Article 5 (3) (f) EUCD. The position on copying of speeches and public lectures is that Irish copyright law deals with such situations under the general concept of fair dealing for criticism and review. Recorded speeches may be used on the basis of reporting, inter alia, current events, under Sec. 98 Copyright Act 2000.

## **XIV. *Architectural Works etc.***

Sec. 93 Copyright Act 2000 mirrors Article 5 (3) (h) and permits the use of certain artistic works on public display such as buildings, sculptures, models for buildings and works of artistic craftsmanship, which are permanently situated in a public place or in premises open to the public. The provision allows the making of a painting, drawing, diagram, map, chart, plan, engraving, etching, lithograph, woodcut, print or similar thing representing it, the making a photograph or film of it, or broadcasting or including in a cable programme service, an image of it. According to Sec. 93 (3) Copyright Act 2000, the results of such use may be made available to the public by any means.

**XV. *Incidental Inclusion***

Sec. 52 Copyright Act permits the use of works by way of incidental inclusion.

**XVI. *Advertising for Public Exhibitions etc.***

Sec. 94 permits the use of an artistic work by way of reproduction or making available for purposes of advertising the sale of the work. Such copy must not be used for any other purpose.

**XVII. *Caricature and Parody***

Again, no specific provision exists. Works used as an inspiration are not normally infringed by making caricatures or parodies since such use would not qualify as taking a substantial part. In addition, the fair dealing exceptions will apply if this is done for reporting current events (Sec. 51 (2) Copyright Act 2000) or for purposes of criticism or review.

**XVIII. *Demonstration and Repair***

There is no specific provision dealing with demonstration and repair, although it is submitted that this would be allowed under general principles of common law copyright.

**XIX. *Artistic Works***

Sec. 93 Copyright Act 2000 deals with the use of artistic and architectural works (see para. XIV. *supra*).

**XX. *Research or Private Study***

The Act does not contain specific limitations on making available works on dedicated terminals. Research and private study exceptions only apply with respect to copying. In addition, Sec. 55 (4) Copyright Act 2004 allows the showing or performance of sound recordings, films, broadcasts or cable programs before a school audience for purposes of instruction. This does not encompass the use of works on computer terminals which have been made available to the public since the reference in Sec. 55 (4) Copyright Act 2000 only refers to traditional acts of simultaneous showing. It is predictable that such use will be subject to a future licensing scheme.

**C. Compensation Scheme**

The Irish copyright law does not comprise a levy scheme but permits collective licensing agreements. As noted, authors and right holders may receive compensation on the basis of collective licensing agreements. The Act does not specify instances in which such regime is inapplicable, and therefore licensing schemes may be set up which detail

certain acts falling within the research and private study exception and the exceptions relating to libraries and archives. Such system is already operational with respect to reprographic copying of books, journals etc. for research and private study by universities and schools.

Given that the Act does not provide for a general private copying defence, the system of compensation shows a strong tendency for favouring collective licensing over general exemptions from copyright infringement. This leaves the opportunity to successively introduce specific licensing schemes for activities making use of digital technology, but the current set up, based upon the identification of any such act, and appears extremely convoluted.

## **D. Technological Protection Measures**

The Irish Act introduced legislation on technological protection measures in 2000, which by that time mirrored the requirements under the WIPO Treaties and the Draft EU CD. Accordingly, a new Chapter 17 was introduced.

In this respect, Sec. 370 Copyright Act 2000 refers to “copies of copyright works to which rights protection measures have been applied or recordings of performances to which rights protection measures have been applied,” are made available to the public, or copies of databases to which rights protection measures have been applied, are re-utilised. Secs. 370 ff. Copyright Act 2000, in addition, complement the provisions on infringement (by doing certain acts) which existed previously. The 2004 regulation, in addition, introduced a balancing clause which maintains rights of certain beneficiaries. As will be explained, the possession of circumvention technologies was already a criminal offence under the 2000 Act (Sec. 140 Copyright Act) and that provision, exclusively drafted in terms of criminal offences, continues to apply and, in that respect, was intended to implement Article 6 (2) EU CD.

The Act does not specifically implement Article 6 (1) EU CD, and as a consequence the prohibition on circumventing technological protection measures is perceived to be a consequence of copyright infringement. The logic of the Act is difficult to reconcile with the Directive. The Act, as such, does not expressly prohibit the circumvention of technological protection measures but makes reference to both civil and criminal offences which relate to the infringement of copyright by either copying or making available a work without consent (Sec. 37 Copyright Act 2000) or by transmitting a work through a network (Sec. 46 (2) Copyright Act 2000). Those acts are simply acts which violate exclusive rights, whether or not technological protection measures have been applied.

In addition, Sec. 140 Copyright Act 2000 imposes criminal sanctions in relation to copyright infringement, albeit not to the act of circumventing as such. Sec. 140 (4) (a) reflects Article 6 (2) EU CD in making it a criminal offence to make, or possesses

protection defeating devices in the context of commercial activities. These are not defined in terms of effectiveness (Article 6 (3) EUCD).

Sec. 140 (4) (b) Copyright Act then continues to impose criminal sanctions in case someone provides information or performs a service intended to assist a person to circumvent technological protection measures. These provisions had already been part of the law but bear no particular resemblance to Article 6 EUCD. First, there is no general prohibition against acts of circumvention in the sense of a principal tort. The act of circumvention carried out by a private person and without a resulting infringement of copyright (in terms of producing a work which is a copy) is not covered. Protection for right holders applying technological protection measures is only available if an act of circumvention results in a distributed copy of the work, and in that respect the provision is redundant since the right holder can then rely on his primary economic rights under Secs. 37 ff. Copyright Act. Secondly, the implementation does not recognize civil liability for acts of dealing in circumvention devices. This leaves the issue as to the scope of protection entirely open. It seems very difficult to reconcile the criminal law solution which is based on acts of a contributory nature (i.e. assisting in acts of circumvention) without detailing a principal tort of circumvention, and likewise the distinction introduced by Sec. 140 (4) (b) Copyright Act criminalizes contributory acts but does not expressly allow for civil remedies, though such remedy may follow from general tort principles.

The most important defect is the fact that Sec. 140 (4) Copyright Act – which, in general, deals with certain types of assisting copyright infringement - does not permit the perpetrator to rely on defences which under Part II may have exempted the person carrying out the principal act. Thereby, a person who advises someone how to crack the regional encoding of a DVD will commit a criminal offence, whereas the person following such instruction will not even incur civil liability unless he then continues to further copy or otherwise make available that work, though that act is not covered under Article 6 EUCD but under Articles 2 to 4 EUCD. The amendments made under the 2000 Act are further incorporated in Sec. 370, which gives right holders and distributors of works a civil remedy against persons possessing anti circumvention devices.

A specific provision dealing with the cracking of encrypted broadcasting signals was introduced in Sec. 371. In this case, the unlawful reception of the broadcast incurs civil liability, though the provision is silent as to whether such liability will be incurred due to the cracking of the encryption as such or on the basis of unlawful reception.

The 2004 Regulations have modified the provisions on the interaction between permitted acts and technological protection measures (Article 6 (4) EUCD). The previous provision (Sec. 374 as introduced in 2000) permitted the circumvention of technological protection measures for purposes of benefiting from defences under Part II. This did not recognize the specific requirements under Article 6 (4) (4) EUCD in relation to online delivery of copyright material.

The amendment in 2004 restricted the scope of Sec. 374 in order to bring the provision in line with Article 6 (4) EUCD. According to Sec. 374 (1), “nothing in this Chapter shall be construed as operating to prevent any person from undertaking the acts permitted (a) in relation to works protected by copyright, in relation to performances, and also in relation to databases. Sec. 374 (2) Copyright Act 2000 imposes an obligation of the right holder to make “available to the beneficiary the means of benefiting from the permitted act, save where such work...has been made available to the public on agreed contractual terms...”. This right to access can be enforced through normal court proceedings though the self help provision does no longer apply. Beneficiaries have access to a dispute resolution mechanism which gives them a right to apply to the High Court, sec. 374 (3) Copyright Act 2000. the High Court can also enter a an order restraining the right holder (and, apparently, also the distributor) from applying technological protection measures.

Whereas Sec. 374 (1) gives the beneficiary a right to circumvent, Sec. 374 (2) Copyright Act 2000 appears to restrict that right. There is an obvious inconsistency between the two sub-paragraphs in that sec. 374 (1) applies to any person entitled to undertake permitted acts, whereas Sec. 374 (2) restricts the right to claim access to those legally entitled, which may presuppose the existence of a contract. Thereby, Sec. 374 (1) gives a positive self help right to circumvent, whereas sec. 374 (2) refers to judicial proceedings. It is submitted that the requirement to commence judicial proceedings refers to any beneficiary but this is not immediately deductible from the paragraph.

The transposition of Article 6 (4) EUCD in Sec. 374 Copyright Act 2000 also restricts the scope to “this chapter” (i.e. chapter VII Copyright Act 2000), a restriction which will cause further complexities. This leaves intact the criminal provisions under Sec. 140 (4) Copyright Act (which are to be found in Chapter VI) concerning dealings with circumvention tools and assistance in the process of circumvention. As noted, Sec. 140 (6) does not allow persons assisting in acts of copyright infringement to rely on permitted acts applicable to the person committing an otherwise infringing act. The effect is that a person who advises a beneficiary on how to circumvent commits a criminal offence whereas the person circumventing is, at least if Sec. 374 (1) Copyright Act is construed so as to provide a general self help circumvention right for beneficiaries rather than an obligation to instigate judicial proceedings, is exercising a positive right.

The concept followed in Irish copyright law is considerably complicated by its openness to licensing schemes, and the consequential uncertainty this effects as regards the status of beneficiaries. The Irish Act recognizes, as noted, the existence of a licensing scheme which surpasses the right to make copies etc. under Part II of the Copyright Act 2000 with respect to a number of important permitted acts. Limitations do not give rights but can be invoked acts otherwise infringing copyright. The underlying notion is that right holders are likewise entitled and responsible for securing their markets, and therefore a defence cannot be exercised once such market has been secured by way of a licensing scheme without violating the “unreasonable prejudice” test, as part of the fair dealing assessment (see, for instance, Sec. 50 (4) Copyright Act 2000). According to Sec. 374, however, any beneficiary of any permitted act under Part II has a legal right to claim

access at least via the procedural route. Conversely, the Act allows, in the important cases of research and private study and use in libraries, the introduction of licensing schemes a preference for access in cases where a licensing scheme is in place, an instance which will lead to a high degree of inconsistency. Once a licensing scheme is in place, the Act requires, for instance, librarians to observe its terms and conditions. Thereby, the interaction between Sec. 374 and Part II will focus on the status as beneficiary. In case no licensing scheme exists, any person wishing access has the right to demand so, which necessarily denotes that copyright owners do not receive remuneration. If a scheme is established, it is conceivable that such (collective) agreement pre-empts the defence, in which case the exercise of a permitted act within the scope of uses governed by such agreement would violate copyright. It follows that a potential beneficiary will lose that status as soon as a scheme is initiated. Owners of copyright will then be able to simultaneously circumvent Sec. 374 (by stripping the potential beneficiary off its status) and to impose restrictive terms and conditions. However, there is no clear answer since the Irish transposition does not make reference to the application of technological protection measures (Recital 35 EUCD), and the Act itself is undecided as to the dogmatic status of acts of fair dealing.

In conclusion, the Irish implementation is likely to cause significant problems. The main reason is that the Irish Act does not clearly indicate the systematic categorisation of acts of circumvention. Neither is an act of circumvention expressly characterised as a tort, nor is the status of beneficiaries clear. The technical decision to criminalize certain commercially oriented dealings in circumvention devices under sec. 140 (4) Copyright Act implies that an act of circumvention may be construed as a principal tort, though this is difficult to reconcile with the absence of any express statutory definition complying straightforwardly with Article 6 (1) EUCD. Likewise, no definition is provided in relation to the effectiveness of technological protection measures. The implementation of Article 6 (4) EUCD leaves open whether a self help right exists or whether beneficiaries are requested to seek judicial relief. The status of beneficiaries is unclear due to the general qualification of permitted acts as defences, and licensing schemes may override the access rights provided for in Sec. 374 Copyright Act 2000, which will provide right owners with a concurrent opportunity to claim license fees and to restrict the ambit of Article 6 (4) EUCD. The criminalization of acts under sec. 140 (1) Copyright Act 2000 only applies if works are additionally copied or made available irrespective of whether this was done by cracking anti circumvention devices. The scope of Article 6 (2) EUCD, as mirrored in Sec. 140 (4), is excessive and inconsistent with the provisions in Secs. 370 ff Copyright Act 2000.

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## **E. Rights Management Information**

The provisions on rights management information have been implemented in a fashion much more proximate to Article 7 EUCD, and faithfully mirror its wording. Sec. 375 Copyright Act 2000 grants protection against anyone who removes rights management information. The provision is technically drafted as a remedy for copyright infringement

and the removal of right management information incurs civil liability in accordance with the general remedies available for copyright infringement. The provision refers to the removal or alteration of rights management information and also prohibits the making available of any such copy from which rights management information has been removed. Reasonable knowledge is required. Sec. 376 Copyright Act, in the same vein, imposes criminal liability on persons removing or alteration of rights management information.

## XV ITALY

The Directive was implemented in Italy under legislative decree No. 68 of 9 April 2003 (*Decreto Legislativo 9 aprile 2003, n. 68, "Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione", pubblicato nella Gazzetta Ufficiale n. 87 del 14 aprile 2003*) into the Basic Italian Copyright Law Act (Act No. 633 of 22 April 1941 as amended). The decree law<sup>235</sup> was approved on 28 March by the Italian Council of Ministers, containing 41 provisions amending the Copyright Act 1941. Consumer groups have criticised the eventual haste with which the law was passed in parliament, leaving only ten days from the publication of the decree law until approval in parliament. Although an open letter was sent to the Cultural Commission of the Parliament asking to revise the law, this was not taken into account.

### A. Exclusive rights

Italian copyright law comprises an umbrella clause which reserves all forms of economic exploitation to the author, Article 12 Copyright Act. Thereby, the specific exclusive right display a more descriptive character. The general position taken is that the author may prohibit any use of the work any form or manner whether original or derivative. Specific rights are listed in Articles 13 – 19 Copyright Act.

#### I. *Reproduction Right*

Art 13 Copyright Act contains the reproduction right. It was amended so as to comply with Article 2 EUCD and now encompasses the direct or indirect, temporary or permanent making of copies. This covers both storage in electronic form and transient copies. Temporary and ephemeral reproductions were not previously expressly covered, but it was understood that such forms of copying were covered under Article 12 Copyright Act. The right is granted to all beneficiaries required.

#### II. *Communication to the Public*

Article 16 contains a general “remote diffusion” right which has been amended so as to include the making available aspect under Article 3 EUCD. According to Article 16, the communication to the public right comprises the making available of a work in such a way that members of the public may access them it from a place and at a time chosen by them. The communication right also deals with certain forms of simultaneous acts such as distance diffusion (telegraphy, telephony, radio or television broadcasting) the making available of works may occur by wire or wireless means. Article 16 (2) Copyright Act reiterates that the act of making available does not exhaust the right. It is open, however, whether a subsequent act of online distribution (for instance, the purchase of a piece of

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<sup>235</sup> <http://softwarelibero.org/progetti/eucd/bozza-legge-italiana.shtml>



software for download) would. Since Article 16 (2) Copyright Act refers to “any act of communication” including making available, it appears that exhaustion in relation to a work stored, under a contract, on the purchaser’s hard drive, would not exhaust the distribution right in the copy.

Prior to the amendment of Article 16 (1), the question of non-simultaneous acts of communication was not addressed but supposed to be covered under Article 12 Copyright Act.

### **III. *Distribution Right***

Article 17 contains the distribution right, defined as the exclusive right to market, place in circulation or make available to the public, by whatever means and for whatever purpose a work or copies thereof. The right extends to placing a protected article on the market in the countries of the European Community. Exhaustion requires that the first sale or transfer of ownership is made by or with the consent of the right holder within the Community. Article 17 (3), once again, reiterates that exhaustion does not apply to the making available to the public of a work by interactive services. The free delivery of copies for promotional purposes or for teaching or scientific research, when carried out or authorized by the right holder, shall not be deemed to be exercise of the exclusive right of distribution.

## **B. Exceptions and Limitations**

Italian law provides for most of the limitations under Article 5. The three step test is included in a dedicated provision (Article 71-nonies) as well as reflected in a number of specific limitations. According to Article 71decies Copyright Act, the exceptions and limitations to authors’ rights apply also to the neighbouring rights. The Act draws a systematic distinction between reprographic copying and copying for certain private uses. Most limitations that came under the Directive have been added to the Chapter on private copying, which includes copies made for certain more specific purposes covered under Article 5 (3) EUCD.

### **I. *Transient Copies***

The mandatory transient copying clause has been transposed in Article 68bis Copyright Act. The clause leaves intact the provisions concerning liability of intermediary service providers set out in the law regulating electronic commerce. The transposition provides that temporary acts of reproduction, which have no independent economic significance, which are transient or incidental and an integral and essential part of technological process and whose sole purpose is to enable the transmission in a network between third parties by intervention of an intermediary or the lawful use of a work or other subject matters shall be exempted from the reproduction right.

## **II. Reprography**

Reproduction on paper or a similar medium is permitted under a number of limitations. Article 68 (1) Copyright Act permits a variety of uses which fall either under Article 5 (2) (a) or another clause under the EUCD. The central stipulation is contained in Article 68 (1), which was amended so as to comply with Article 5 (2) (a) EUCD. It permits the reproduction of single works or of portions of works for the personal use of readers, when made by hand or by a means of reproduction unsuitable for marketing or disseminating the work in public. The permission only covers literary works (readers) and the restriction to certain means of reproduction details that mass means of reproduction are excluded. Reproduction for personal use of intellectual works made by means of photocopying, xero-copying or like means is limited to 15% of each volume or issue of a magazine (Article 68 (3) Copyright Act).. The act imposes an obligation to pay remuneration in cases of reprographic copies on the operator of establishments providing means for reproductions, such as copy centres providing copying or xero-copying machines or like reproduction systems accessible to third parties (even for free). The amount of remuneration and terms of collection and distribution are detailed under Article 181ter Copyright Act of this Law. The device levy is payable to SIAE.

The copy must be made by the beneficiary in person. The Italian Act does expressly not permit third parties to make such copies.

All other relevant limitations fall within the broader framework of the private copying regime which includes both copies made by way of reprography and digitally.

## **III. Private Copying (Phonograms or Videograms), Article 5 (2) (b) EUCD**

Article 71sexies (1) Copyright Act permits the making of copies of phonograms and videograms only, and on any carrier, if the copying is carried out by a natural person for the sole purpose of personal use and without an intent to make profit or for any direct or indirect commercial purpose. The reproduction must comply with technological protection measures applied, i.e. the user must follow the dispute resolution procedure foreseen under Article 71sexies (4)<sup>236</sup>. Third party reproductions are not permitted. Interestingly, the supply of services for enabling such copies to be made “shall constitute an act of reproduction and shall be subject to the provisions pursuant to Articles 13, 72, 78-bis, 79 and 80.”, i.e. will constitute an infringement by way of reproducing works (Article 13), reproducing a phonogram (Article 72), reproduction of broadcasts (Article 80) and by utilising a phonogram for purposes of broadcasting. Thereby, a person supplying services for enabling the making of private copies infringes the reproduction right, as afforded to authors, phonogram producers and/or broadcasters.

Importantly, the Italian solution has transposed Article 6 (4) (4) EUCD not only with regard to contractual agreements as a re-exception to the obligation to remove technological protection measures in certain cases. It has also, under Article 71sexies (3),

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<sup>236</sup> See below, XVD.III, p. 294ff.

introduced a general preference of contractual limitations on the right to make private copies. This pertains to both interactive services as mentioned under Article 6 (4) (4) EUCD *and* to agreements which stipulate conditions for access in general. This is in contrast to most member states where reliance on limitations cannot be contractually avoided.

The Italian Act, as regards contracts detailing condition for use, thereby gives right holders an exceedingly powerful instrument which is outside the scope of both Article 5 (2) (b) and 6 (4) (4) EUCD. The effect is not only to limit the scope of the private use exception (which is limited to videograms and phonograms anyway) but also to introduce a more general notion connoting that immediate contractual stipulations discard and pre-empt existing limitations.

Since Article 71sexies (3) allows contractual stipulations to override the private copying clause, it is also questionable whether the same applies with regard to analogue copies. Since the reprography exception does not apply to videograms and phonograms, analogue copying is subject to Article 71sexies exclusively. Thereby, the right to make copies can be limited even for copies made on traditional carriers (such as blank tapes).

The restriction will cause right holders not only to install technological protection measures but also to revert from purchasing contracts towards contracts for renting protected content, a scenario which conflicts with the exhaustion rule in that right owners may not be able to transfer property in the carrier.

The private copying exception is subject to remuneration paid via a blank carrier levy. The types of carriers are defined by way of decree and collected by S.I.A.E. (Italian collective society). The “fair compensation” for right-holders has been implemented as a bill on devices such as blank CD-ROMs, hard disks etc. in 1992, and recently also on VCR equipment. Authors and producers of phonograms, as well as original producers of audiovisual works, performing artists and producers of videograms and their successors in title, are entitled to receive a remuneration for the private reproduction of the phonograms and videograms under Article 71-sexies. In respect of the devices solely meant for the analogue or digital recording of phonograms or videograms, this remuneration shall consist of a percentage on the price paid by the retailer or *of* a fixed amount for each device. For multifunctional devices, the remuneration is based on the price of a device which has features equivalent to the internal recording component or, when it is not feasible, it shall consist of a fixed amount for each device. As to audio and video recording media, such as analogue carriers, digital carriers, fixed or removable memories which are meant for the recording of phonograms and videograms, the level of the remuneration shall take full account of the recording capacity of each medium. The remuneration is determined by a decree of the Minister of Culture, after hearing the Committee under Article 190 Copyright Act and the most representative trade associations of manufacturers of devices and media under paragraph 1. For the purpose of determining the level of the remuneration, the application or non-application of the technological measures under Article 102-quater shall be taken into account; for the same purpose, it shall also be considered the different impact of digital copying in

comparison to analogue copying. The decree shall be submitted to revision every three years. The remuneration is due by the persons who manufacture or import in the territory of the State for commercial purposes, the devices and media referred to in paragraph 1. The above persons shall quarterly submit to the Italian Society of Authors and Publishers a statement of the sales made and of the remuneration due; this latter must be paid upon presentation of the statement. In the event the remuneration is not paid, the distributor of the recording devices and media shall be jointly liable for its payment.

#### **IV. *Teaching and Research***

The Italian Act does not comprise a general limitation on reproductions for purposes of teaching or research. The Act regulates educational concerns only under the limitation on quotations. Otherwise, the reprography exception applies.

#### **V. *Libraries, museums and archives***

Art. 68 (2) Copyright Act permits reprographic reproductions in public and scholastic libraries, in museum and public archives for their own services without direct or indirect commercial purpose. Article 68 (5) Copyright Act levies photocopies of works in public libraries for services of public libraries. Reproductions of works available in public libraries, made inside the library are permitted, within the limitations provided for, on payment of a lump sum remuneration in favour of right holders, pursuant to paragraph 2 of Article 181-ter, fixed according to the second sentence of the 1st paragraph of Article 181-ter. This remuneration is paid on a yearly basis directly by the libraries, making up on the revenues collected for their service, without any further charges to the State balance or to the balance of the bodies to which libraries are subject. The limitations under paragraph 3 shall not apply to works that are not present in publishing catalogues and that are rare, as they are hard to find through commercial channels. Article 68 (2|) Copyright Act reflects both Article 5 (2) (a) and 5 (2) (c) EUCD. Thereby, digital copying in such establishments is explicitly ruled out.

#### **VI. *Broadcasters***

Art. 55 (a) Copyright Act concerns broadcaster's rights under Article 5 (2) (d) EUCD. Broadcasters may, according to an amended Article 55, make ephemeral reproductions. The provision imposes an obligation to delete or render unusable such recording. Preservation is permitted if the recording is of exception documentary character, but not be economically exploited unless the author consents.

#### **VII. *Social Institutions (Hospitals)***

Art. 71<sup>quarter</sup> Copyright Act permits public hospitals and prisons to make copies of broadcasts for internal use within the hospital or prison. The right holder receives fair compensation.

### **VIII.** *Disabled People*

A newly introduced Article 71bis (1) Copyright Act allows reproduction and communication to the public for the benefit of disabled people. This covers the reproduction of works or protected subject matter as well as the use of their communication to the public by persons with a disability, for personal use, provided these permitted acts are directly related to the disability, are of a non-commercial nature and are limited to the extent required by the specific disability. In a decree adopted by the Minister of Culture, in agreement with the Minister of Labour and Social Affairs, after hearing the Committee under Article 190 of this Law, the categories of disabilities referred to in paragraph 1 and the criteria to identify individual beneficiaries are stated, as well as, if necessary, the conditions on which this exception shall be enjoyed.

### **IX.** *Current Economic, Political or Religious Topics*

Article 65 (1) Copyright Act permits the making of copies and communication to the public of articles on current interest of an economic, political or religious character, published in magazines or newspapers, as well as of articles broadcast or made available to the public, and other subject-matters of the same character. The limitation only applies with respect to their use in other magazines or newspapers, or to be broadcast in news programs, unless such reproduction or utilization is expressly reserved, provided the source, the date and the author's name, if quoted, are indicated.

Article 65 (2) Copyright Act also allows the reproduction or communication to the public of works or protected subject-matter made during current events for the purposes of reporting current events and to the extent justified by the informatory purpose, as long as the source, including the author's name, if quoted, is indicated, unless it turns out to be impossible. In contrast to Article 5 (3) (c) EUCD, no restriction as to the informatory purpose applies, though such restriction will be implicit.

### **X.** *Quotations*

Art. 70 Copyright Act permits quotations, abridgments or reproduction of fragments or parts of a work and their communication to the public for the purpose of criticism or discussion within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work. In addition, such use is permitted for purposes of teaching or research, the use must have the sole purpose of illustration, and non-commercial purposes from and abridgements of works for purposes such as criticism or review and teaching or private research unless the use is of a commercial nature. The latter restriction was introduced under Article 9 of the Decree Law and c research and teaching. This is introduced by s. 9 of the Italian implementation, which modifies the old copyright law (no. 663, April 22, 1941). The old law allowed quotations without referring at all to their "non-commercial purposes."

The implementation introduces a clear limitation to the old exception. This, as far as analogue copying is concerned, much narrower, since the quotation limb of Article 5 (3) EUCD is implicitly non-commercial in nature and a commercial purpose is not required. In relation to criticism or review, as far as such uses in the press are concerned, the same situation arises since, under Article 5 (3) (c) EUCD a non-commercial purpose is not required and, in relation to such use made for purposes of news reporting, an indication as to the informative purpose is absent. In this regard, Article 70 (1) is difficult to construe. Article 70 permits quotations for criticism or review, which applies to uses by the press, but it has a significantly narrower scope of application than Article 65 Copyright Act. Article 70 excludes uses which conflict with the normal exploitation, whereas Article 65 is not restricted in any way (as noted, no restriction to informative purposes applies). It follows that the concurrent application of both provisions, insofar as the media is concerned, will cause conflicts, since it explicitly reserves any form of commercial exploitation, which, as noted, has an extremely wide connotation in Italian law and is not restricted to commercial uses. Hence, an online news service may make available current news without restriction, but provided that the author has not reserved such use. In case of reviewing a recently and thus current Article in news service, Article 70 will apply. In this case, if the right has been reserved, the question arises whether Article 65 or 70 applies. If only Article 70 applies, the ensuing issue is whether such use conflicts with the normal exploitation of works.

In relation to teaching or scientific research, Article 70 (1) is narrower than Article 5 (3) (d) EUCD. In this case, a non-commercial purpose is required. Under the Directive, the purpose as regards illustration for teaching and scientific research in schools and universities, is implicitly non-commercial in nature. Article 70 Copyright Act reverses this by restricting such use to quotations and specifying parts of works. Article 5 (3) (e) EUCD is not restricted to non-commercial purposes since it presupposes quotations an element of public intellectual discourse. This has nothing to do with reproductions made in schools and universities, which is regulated, for that reason, under a different heading. In addition, since teaching and research purposes are not, as such, governed by a general provision, the clause also requires the non-commercial purpose in relation to analogue copies, which is narrower than the Directive. In effect, Article 70 (1) requires, for both analogue and digital “copies”, a non-commercial coupled with a quotation or abridgement for purposes of illustration. In addition, Article 70 would not permit the communication to the public for purposes of illustration unless this is done in relation to quotations, abridgements or partial copies of works, whereas Article 71<sup>ter</sup> Copyright Act, which implements Article 5 (3) (n) EUCD (use by communication to the public on dedicated terminals by, inter alia, schools and university libraries) does not require such constraints as to the portion of the work used.

Under Article 70 (3) Copyright Act, any abridgment, quotation or reproduction must always be accompanied by a mention of the title of the work, and of the names of the author, the publisher and, in the case of a translation, of the translator, whenever such mentions appear on the work that has been reproduced.

## **XI. *Public Security***

Article 67 Copyright Act permits the reproduction of works or portions of works shall be permitted for the purposes of public security as well as in parliamentary, judicial or administrative proceedings, as long as the source, including, where possible, the author's name, is indicated.

## **XII. *Speeches (Reporting Current Events)***

The use of public speeches is permitted only in relation to purposes of reporting current events, Article lectures only for purposes of reporting current events, Article 66 Copyright Act.

## **XIII. *Caricature and Parody (Criticism or Review)***

The Italian Act does not contain a specific provision of caricature and parodies but the scope of Article 5 (3) (k) EUCD is mirrored in Article 70 (quotations for the purpose of criticism or review). Accordingly, such use must not conflict with a normal exploitation.

## **XIV. *Communication for Research and Private Study***

Article 71<sup>ter</sup> permits the communication or making available to individual members of the public is free if made for the purpose of research or private study by dedicated terminals on the premises of publicly accessible libraries, educational establishment, museums or archives, limited to the works and other subject matter contained in their collections that are not subject to purchase or licensing terms.

## **C. Compensation System**

The Italian Act provides for fair remuneration requirements for most limitations relevant, in particular for private reprography to be paid by those who provide the means or by other entities providing such means (i.e. libraries), as discussed above.

In relation to digital and other copies of phonograms and videograms, Article 71<sup>septies</sup> (1) Copyright Act specifies that authors and producers of phonograms, as well as original producers of audiovisual works, performing artists, producers of videograms, and their successors in title are entitled to receive a remuneration for the private reproduction of the phonograms and videograms under Article 71<sup>sexies</sup> Copyright Act (private copying). This foresees, in relation to devices exclusively intended for making copies, a remuneration according to a percentage on the price paid by the retailer *or* of a fixed amount for each device. For multifunctional devices, the remuneration is based on the price of a device which has features equivalent to the internal recording component *or*, when this is not feasible, a fixed amount for each device. The same applies with respect to blank carriers intended for copying.

As to audio and video recording media, such as analogue carriers, digital carriers, fixed or removable memories which are meant for the recording of phonograms and videograms, the level of the remuneration is based on the recording capacity of each medium. 2

The modes of remuneration are determined by a decree of the Minister of Culture, after hearing the Copyright Committee under Article 190 Copyright Act and the “most representative trade associations of manufacturers of devices and media”.

The application or non-application of technological measures (Article 102<sup>quater</sup>) is to be taken into account; as is the different impact of digital copying in comparison to analogue copying. The decree is revised every three years.

The remuneration is due by manufacturers and importers.

## **D. Protection of Technological Measures**

Italy has chosen to implement Article 6 under three different chapters of the Copyright Act. Article 6 (1), dealing with acts of circumvention, has been transposed under a new Article 102<sup>quater</sup> Copyright Act in a chapter concerning miscellaneous provisions; Article 6 (2) (prohibition on any commercial dealings) has been systematically been inserted in the Chapter on sanctions. Article 6 (4) EUCD can be found in the section dealing with limitations. Article 71<sup>sexies</sup> (4) Copyright Act provides an obligation on right holders applying technological protection measures with respect to personal digital copying.

Article 71<sup>quinquies</sup> Copyright Act does not apply to computer programs, Article 102<sup>quater</sup> (3) Copyright Act.

### **I. Acts of Circumvention**

Article 102<sup>quater</sup> implements Article 6 (1) EUCD. It provides that right holders of any copyright or of any right related, as well as the database maker right (Article 102<sup>bis</sup> (3)) *may* apply to protected works or subject-matters any effective technological measures, including any technology, device or component that, in the normal course of its operation, are designed to prevent or restrict acts which are not authorized by them. Article 102<sup>quater</sup> (2) defines technological protection measures and effectiveness by closely following the Directive as ‘effective’ where the use of the protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or any other transformation of the protected work or subject-matter or it is limited through a copy control mechanism, which achieves the protection objective.

Prohibition on acts of circumvention of technological protection measures are now to be found in Article 174<sup>ter</sup> (1). The provision foresees for those who “exploit unlawfully” penalties which go way beyond what the Directive intended. The provision does not specifically deal with technological protection measures but penalizes a number of uses not authorized by the right holder. In relation to circumventing technological protection measures, it inflicts a fixed fine (as administrative penalty) of € 154. The perpetrator will



also have any devices used forfeited and faces publication of that sentence in “a national newspaper” .

The act of circumventing is formulated as ancillary to certain types of non-commercial uses deemed to be infringing, which include “using means intended to circumvent” technological protection measures and any form of exploitation of a non-commercial character (which are dealt with, in relation to technological protection measures, under Article 171ter (2bis) Copyright Act) . More worryingly, the clause also penalizes the purchase and rental of circumvention devices by private users, which goes beyond both Article 6 (1) and 6 (2) EUCD.

It would follow that Italian law does arguably permit circumvention in order to make non-infringing uses outside the scope of copyright since the prohibition is clearly related to the “exploitation” mentioned. However, under Italian law the scope of that prohibition is not transparent. As noted, the exclusive rights as provided for and enlisted are not conclusive. Article 12 Copyright Act sets out a general right of authors to prohibit any economic exploitations (“the exclusive right to the economic utilization”). Given that Article 174<sup>ter</sup> prohibits non-commercial uses in general, including those which are not covered under a limitation expressly reserved under the implementation of Article 6 (4) EUCD (see below), this denotes that economic exploitation refers to any act for which the author could have requested remuneration. Otherwise, the general penalization of non-commercial acts by natural persons would be obsolete.

In addition, the law prohibits both the purchase and rental of circumvention devices. This is not qualified by an intention to at least a standard of negligence as regards an eventual violation of copyright, but does require a commercial purpose on part of the purchaser. A certain relationship with copyright infringement may thus be established by taking the definition of technological protection measures into account, yet this relates only to commercial dealings under Article 102<sup>quater</sup> (2) and is not replicated or expressly referred to in Article 171<sup>ter</sup> (1) Copyright Act. It would indeed be illogical to permit circumvention of technological protection measures for non-infringing purposes and to concurrently prohibit the purchase or other obtaining of such circumvention tools.

As will be discussed in more detail below, the Italian Act places emphasis primarily on the prohibition of marketing etc. circumvention devices, i.e. the core provision implementing Article 6 has been perceived as providing means to circumvent, which reverses the order of the acts as prescribed in Article 6 EUCD. Thereby, and adding to the uncertainty under Article 174<sup>ter</sup> (1) Copyright Act, the act of circumvention is ancillary to either some form of copyright infringement or it is ancillary to the extensive prohibition on commercial dealings. In relation to Article 174<sup>ter</sup> (1) Copyright Act, this leads to a potentially unlimited and unprecedented scope of the prohibition on circumvention. Primarily, this is because the link between a primary act of commercial dealings in any devices and acts of circumvention is established via the prohibition of purchasing and renting such equipment. In effect, this outlaws the sheer possession of such technology. The escape route for defendants, it may be surmised, is then to

exclusively rely on a non-prohibited nature of the circumvention tool, in particular as regards the “primary purpose” test.

## **II. *Commercial Dealings***

Article 171<sup>ter</sup> (f<sup>bis</sup>) Copyright Act prohibits, in transposing Article 6 (2) EUCD, the manufacture, import, distribution, sale, rental, and ‘transfer under whatever title’, the advertisement for sale or rental and the possession (“holding”) for commercial purposes devices, products or components, or provides services whose main purpose or commercial use is to circumvent any effective technological measures under Article 102<sup>quater</sup> Copyright Act, or which are primarily designed, manufactured, adapted or performed for the purpose of enabling or facilitating the circumvention of said measures.

This comprises technological protection measures applied or remaining after certain measures are removed by right holders voluntarily or by virtue of agreements with the beneficiaries of exceptions, or in compliance with an injunction by an administrative or judicial authority. The provision sanctions this with imprisonment of between six months and three years and a fine monetary fine.

The way in which Italy has dealt with Articles 6 (1) and (2) respectively causes contradictions within the Act since the transfer of circumvention devices falls within both categories – in this case, a seller would only incur liability if this was done for commercial purposes, the buyer, in contrast, will be liable (and face a criminal sanction) without such requirement.

The clause goes beyond Article 6 (2) EUCD in sanctioning both the possession and the transfer of such devices, which will have effects not envisaged under the Directive.

## **III. *Voluntary Means and Access for Beneficiaries (Article 6 (4) EUCD)***

Article 6 (4) EUCD has been implemented in two different provisions in the chapter dealing with copyright limitations. The Act divides Article 6 (4) into three distinct regulatory areas dealing with public security, private copying and, in addition, certain other limitations.

Article 71<sup>quinquies</sup> (1) provides that right holders who have applied technological protection measures are obliged to remove them, upon request of the competent authority, in order to allow the utilization of the protected works and of subject-matter, for public security purposes or to ensure the proper performance of and administrative, parliamentary or judicial proceeding.

In addition, Article 71<sup>quinquies</sup> (2) obliges right holders to adopt “proper solutions”, which include the provision of means to gain access upon specific request of certain beneficiaries, or after the conclusion of specific collective agreements with users associations. In each case, it is a requirement that users have obtained lawfully access or lawful possession. Lawfulness is not defined under the provision but the Act, in relation

to a number of specific provisions, implies that lawfulness requires prior compensation, which translates into payment of license fees or through purchase of a tangible work. It excludes, however, copies that have been acquired from an illegal source copy.

Article 71<sup>quinquies</sup> (2) is restricted to beneficiaries of specific limitations, including Article 55, 68 (1), 68 (2), 69 (2), 70 (1), 71<sup>bis</sup> (e), 71<sup>quater</sup> Copyright Act. This can be made dependent upon payment of fair compensation if such compensation claim is provided for under the limitation in question. Given that the Italian Act stipulates that payments made under individual or collective agreements must be taken into account with respect to claims under general levy schemes, the author cannot claim double remuneration under such scheme.

Article 71<sup>quinquies</sup> (3) transposes Article 6 (4) (4) EUCD and excludes any obligation of right holders in relation to Article 71<sup>quinquies</sup> (2) in respect of works or subject-matter made available to the public in such a way that members of the public may access them in a place and at a time individually chosen by them, when the access takes place on the basis of contractual agreements. This does not apply to public security etc. under Article 71<sup>quinquies</sup> (1) Copyright Act. The Act does not specify whether Article 71<sup>quinquies</sup> (2) may apply once access had been granted, i.e. to downloaded material to which technological protection measures have been applied.

In case where voluntary measures cannot be obtained from right holders, Article 71<sup>quinquies</sup> (4), implementing Article 6 (4) (2) EUCD. The implementation is principally based upon voluntary resolutions, i.e. the obligation imposed on right holders, despite the formulation as a positive right, cannot be enforced before a court of justice and judicial enforcement procedures do not initially apply. The Act envisages that agreements shall be concluded between representing bodies of both right holders and users which are encouraged to enter into negotiations. In case this fails, the Act envisages a mandatory dispute resolution to be conducted before the Permanent Copyright Consulting Committee. From there, it will be passed on to the normal courts system. This has been criticised by a number of commentators. The Committee (Article 194 bis Copyright Act), which used to have certain administrative tasks, is nominated by the Prime Minister every four years. The most critical aspect is that Article 191 Copyright Act, as of now, does not comprise representatives of user groups to be elected. The committee is composed of representatives of authors and other right owners, the entertainment industry, certain civil servants from different ministries and three copyright experts. There is a clear danger of bias. .

Finally, private (digital) copying is embraced under Article 71<sup>sexies</sup> (4) Copyright Act. This is in contrast to Article 6 (4) (4) (1) which excludes Article 5 (2) (b) EUCD, but the Italian transposition now clarifies that right holders must allow that natural persons may make private copies notwithstanding the application of technological measures under Article 102<sup>quater</sup> Copyright Act. This was drafted on the basis of Article 6 (4) (4) (2) EUCD.

Accordingly, the natural person who has acquired legal possession of copies of the protected works or of protected subject matters, or has legally accessed them, may make a private copy, which can also be an analogue copy, for personal use, on condition that this act does not conflict with the normal exploitation of the work or of the other subject-matter and does not unreasonably prejudice the right holders. This does not apply in relation to online services (Article 6 (4) (4) EUCD and Article 71<sup>sexies</sup> (3) Copyright Act).

Although this follows the Directive, some reservations must be asserted. The provisions impose an obligation upon right holders in all cases where the beneficiary had legal access. Legal access may refer to both online and offline uses. In case of online uses, no obligation arises to grant access.

In relation to works made available in such way, however, an obligation may arise because Article 71<sup>sexies</sup> (4) Copyright Act only requires legal access (under a contractual agreement) but the provision effects a right of users to make private copies under Article 71<sup>sexies</sup> (1) Copyright Act even if an agreement is in place. In addition, the provision does, in contrast to Article 6 (4) EUCD, not specify a reservation of the right holder as to the number of copies. This results in uncertainty as to the permissible scope of such agreement, and given that Article 71<sup>sexies</sup> (4) is formulated as a limitation, might render the supremacy of individual agreements, as envisaged under the Directive, obsolete.

Conversely, as already noted *supra*<sup>237</sup>, general contractual agreements between right holders and users pre-empt the private copying exception as regards both the making of analogue and digital copies. This denotes that if a contractual right to access an online service will exclude the obligation to make available circumvention means for works downloaded provided an additional agreement is in place which concerns such uses, because in such case the private copying exception is inapplicable, Article 71<sup>sexies</sup> (3) Copyright Act. Legal uncertainty will arise in cases where the existence of terms concerning the use of works downloaded is not governed by an additional agreement.

In any case, the obligation does not arise with respect to copies made from illegal file sharing networks.

#### IV. *Judicial Responses*

The systematic structure of the Italian solution to implement Article 6 EUCD leaves a number of problems. The rigidity of prohibitions, coupled with a wide permission for right holders to pre-empt limitations by contractual agreements, not only makes it difficult for beneficiaries to gain access but may also have a detrimental effect on the development of technologies. The Italian solution, once the judicial threshold of defining effective technological protection measure is passed, does not leave courts considerable freedom of movement. The effect is that the scope of application of technological protection measures protection, and any ensuing need to balance this

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<sup>237</sup> See above, XVB.III, p. 286ff.

against countervailing arguments, must be assessed by defining what is effective. Indeed, this was the approach taken by the Court of Bolzano in its decision of 31.12.2004. The court held that Article 171ter, which prohibits dealings in circumvention devices under Article 6 (2) EUCD, does not apply with regard to chips used by Sony on its Playstation consoles which restrict the consoles from reading disks manufactured for other regions and only those manufactured by the claimant, but technology was offered which restored the consoles' original functionality by removing the technological restrictions. . The decision asserted that the use of the restrictions was not to enable the protection of copyright but to foster monopolistic standardisation. It inferred that this was disproportionately detrimental to consumers. The decision was reached by excluding the claimant's technology from the "primary purpose" test. In addition, the Court held that the use of such restrictive technology conflict with the (physical) property in the game consoles. Therefore, the question of authorization did not arise. The judgement did not specifically assess the legislative wording but predominantly conducted a rather wide ranging balancing of interests, which makes it difficult to assess whether Italian courts will follow it or whether it will have any impact such as more flexible and less literal construction of the law.

## **V. *Computer Programs***

The provisions on technological protection measures do not affect computer programs. The Act prohibits, under the Chapter dealing with sanctions in general, the putting into circulation or possession for commercial purposes of any means the sole purpose of which is to facilitate the unauthorized removal or circumvention of any device applied to protect computer programs, Article 161 Copyright Act. The immediate act of circumventing is not covered but the law is unclear on this point. Sec. 23 of the implementing decree saves expressly the right to observe and study for the purpose of achieving interoperability with another program though this is not reflected in the final Act as amended.. According to Article 64<sup>quater</sup> (1) (a) Copyright Act, such act may only be done by a lawful user or with authorisation. Likewise, Italian law permits the owner of copyright in a computer program to contractually restrict the right to make back up copies to a certain degree.

In cases where a device is used in commercial circumstances in order to remove or circumvent such protecting device the act does not prescribe any specific sanction; if the same device is in the possession of, for instance, a manufacturer of printers who needs to rely on interoperability information, Article 161 prohibits possession even if the person is a licensee. Thereby, an act of circumvention, although not prohibited as such, will be practically rendered impossible in commercial situations since such act necessarily requires the possession of such devices. If so, problems may arise with respect to Article 6 (4) (5) EUCD.

## **E. Rights Management Information**

The provisions on rights management information have been implemented in the same fashion as those under Article 6. Article 102<sup>quinquies</sup> (1) permits right holders to insert electronic information on copyright management in the protected work or subject-matter, or such rights management information may appear in connection with their communication to the public. Rights management information is defined as so as to identify the protected work or subject-matter, as well as the author or any other right holder, or to contain particulars about the terms and conditions of use of the protected work or subject-matter as well as any numbers or codes that represent such information or other items of identification. The Act sanctions the removal or alteration of such rights management information. Article 171<sup>bis</sup> h) provides that a person who unlawfully removes or alters the electronic rights-management information under Article 102<sup>quinquies</sup>, or distributes, imports for distribution, broadcasts, communicates or makes available to the public protected works or other subject-matters whose electronic information has been removed or altered, is liable to imprisonment of between six months and three years and a fine of between € 2500 and € 15000.

## **F. Sanctions**

The Italian law has introduced rather specific sanctions for copyright infringement, and in relation to both Article 6 and 7 EUCD, the sanctions follow those foreseen for copyright infringement. In particular, the law includes specific criminal sanctions, as indicated, whereas civil sanctions are identical to those for general infringement.

## **G. Conclusion**

A number of observations can be made on the Italian implementation. Whereas in general it complies with the Directive, some reservations and problem areas can be asserted which are likely to cause discrepancies in the application.

There are no specific deviations as far as the economic rights and the mandatory limitations under Article 5 (1) EUCD is concerned, though it should be noted that the Italian takes a rather different stance in reserving a limitless right of economic exploitation to the author. This may have effects on the interpretation of the three step test, which forms an immediately applicable interpretation rule under Italian law, is concerned, and also with regard to the general restrictions imposed on users and its extension to private uses in general.

Italy has introduced certain new limitations on copyright which reflect the wording of the Directive's relevant sections closely, though in general the limitations available are much more restrictive than in other member states and also as compared to the freedom offered under Article 5 EUCD.

First, acts done for private purposes are restricted to either reprography or, if digital, to videograms and phonograms. Third parties may generally not make reproductions on behalf of users which excludes any document delivery for both commercial and non-

commercial purposes. The limitations on private copying of phonograms and videograms is subject to contractual agreements which may outlaw such right. The stance taken can have a more extensive effect by introducing a general notion that contractual agreements may rule out limitations which is in contrast to some other member states where the opposite applies. Naturally, this has a much more wide ranging effect as regards technological protection measures and its interface with limitations.

The limitations on teaching and scientific research have been transposed both under new provisions (in relation to use on dedicated terminals) and under existing provisions permitting quotations for such purpose, which renders the limitations extremely narrow. As far as press uses are concerned, Article 5 (3) (c) EUCD has been faithfully transposed but overlaps with the quotation exception persist, which renders it difficult to define the scope of the exception.

Article 6 has been transposed in a rather unique fashion by introducing a general criminal offence for certain types of using circumvention technologies, which is related to a rather unclear provision permitting right holders the use of such technologies. The Act is not clear on whether the circumvention must ensue in an infringement of copyright, though given that the possession by a user (for non-commercial purposes) is prohibited it would appear that this is the case. Conversely, commercial dealings, dealt with in a different chapter, require commercial purposes, with the effect that a seller for non-commercial purposes is not liable whereas a private buyer of circumvention technology is. In addition, the decision by the Bolzano Regional Court adds to the uncertainty created by simply juxtaposing the effects and purpose of technological protection measures with more wide ranging consumer protection sentiments.

The voluntary measures foreseen as regards beneficiaries are divided according to different types of limitations. The general position is that right holders have a positive obligation to provide means but this is subject to a number of exceptions. The supremacy of contractual agreements is not entirely clear as regards limitations based on private copying, though again this only affects videograms and phonograms. It appears that, in the absence of a contractual agreement defining the use of works downloaded, Article 6 (4) (4), as implemented, would only restrict access to the service, whereas for any subsequent use a specific agreement must be in place.

In the absence of voluntary measures, the mediation procedure may prove to be biased given the statutory composition of the Copyright Committee. Article 7 EUCD has been implemented in a similar manner as Article 6 EUCD though the protection of rights management information appears to be clearer. The sanctions imposed are fixed and thus do not leave a lot of space for a balanced assessment.





## XVI LATVIA

The Directive was implemented into the Latvian Copyright Act by the Statutory Instrument No. 16 of 2004 [European Communities (Copyright and Related Rights)] Regulations 2004. The law is in force since 22 April 2004.

Prior to this, minor amendments with respect to transient copying had been made as of 6 March 2003, but the provision was modified again to comply with the Directive.<sup>238</sup> The implementation led to a complete amendment of the Copyright Act.

### A. Exclusive Rights

#### I. *Reproduction Right, Article 2 EUCD*

Section 15 paragraph 1 recital 9 Copyright Act 2004 gives the author with respect to the use of his or her own work the exclusive right to directly or indirectly, temporary or permanently reproduce the work.

According to Section 1 recital 17 Copyright Act 2004 reproduction is the making of one or more copies, by any form and scale, fully or partly, of an object of copyright or neighbouring rights, and includes the short or long term storage in electronic form of an object of copyright or neighbouring rights or a part thereof, as well as the making of three-dimensional copies of a two-dimensional object or two-dimensional copies of a three-dimensional object.

The same right is granted to performers in respect of fixations of their performances (Section 48 paragraph 1 recital 7 Copyright Act 2004), for phonogram producers in terms of their phonograms or copies thereof (Section 51 paragraph 1 recital 4 Copyright Act 2004), for film producers regarding the original of the film or copies thereof (Section 50 recital 5 Copyright Act 2004) and for broadcasting organisations with respect to the fixation of their broadcast (Section 53 paragraph 1 recital 6 Copyright Act 2004).

#### II. *Communication to the public*

Section 15 paragraph 1 recital 1 Copyright Act 2004 implements Article 3 EUCD verbatim and includes both the required making available and communication to the public right. The author has, in addition, the exclusive right to make the work available to the public by wire or by other means, so that it is accessible in an individually selected location and at an individually selected time (Section 15 (1) (13) Copyright Act 2004). This definition is slightly narrower than Article 3 EUCD but the provisions only clarifies the application of the making available right to interactive uses.

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<sup>238</sup> The official English translation is available under  
<http://www.km.gov.lv/UI/ImageBinary.asp?imageid=360>

Communication to the public is defined as any action by means of which, either directly or through a relevant technical device, a work, performance, phonogram or broadcast is made available to the public (Section 1 recital 14 Copyright Act 2004).

The Copyright Act 2004 extends the exclusive right of making available to the public to the performer for the fixations of their performances (Section 48 paragraph 1 recital 5 Copyright Act 2004), to the phonogram producer for their phonograms (Section 51 paragraph 1 recital 2 Copyright Act 2004), to the producer of the first fixation of films for the original and copies of their films (Section 50 recital 3 Copyright Act 2004) and to broadcasting organisations for fixations of their broadcasts (Section 53 paragraph 1 recital 5 Copyright Act 2004).

### **III. *Distribution Right, Article 4 EUCD***

Section 15 paragraph 1 recital 4 Copyright Act 2004 gives the author the exclusive right to distribute his work. Distribution is defined as any activity by which the original or copy of the copyright or neighbouring right object is sold or otherwise disposed of (Section 1 recital 11 Copyright Act 2004).

The Copyright Act 2004 provides corresponding rights for the performers (Section 48 paragraph 1 recital 3 Copyright Act 2004), phonogram producers (Section 51 paragraph 1 recital 1 Copyright Act 2004), film producers (Section 50 recital 1 Copyright Act 2004) and broadcasting organisation (Section 53 paragraph 1 recital 6 Copyright Act 2004).

According to Section 32 Copyright Act 2004 the right to distribute a work shall be exhausted from the moment when such work is sold or otherwise alienated in the European Union for the first time if it has been done by the author himself or herself, or with his or hers consent. This condition applies only to works embodied in concrete material objects or the copies thereof and which are sold or otherwise alienated.

A corresponding exhaustion provision is contained in Section 54 paragraph 4 Copyright Act 2004 for neighbouring rights.

## **B. Exceptions and Limitations, Article 5 EUCD**

Chapter V provides restrictions on the economic rights of the author. These are extended to owners of neighbouring rights (Section 54 Copyright Act). Most exceptions and limitations have been modified or newly introduced with effect from 22 April 2004 with the exception of the pre-existing limitation on personal uses.

The right of the author to permit or prohibit the use of his work (Section 15 paragraph 4 Copyright Act 2004) can be restricted in cases specified by the Copyright Act 2004 (Section 18 paragraph 1 Copyright Act 2004).

Pursuant to Section 18 subsection 2 Copyright Act 2004 the restrictions on the economic rights of an author shall be applied in such a way that they are not contrary to

the provisions for normal use of the work of an author and may not unjustifiably limit the lawful interests of the author. This introduces the “three-step-test” explicitly.

According to Section 54 Copyright Act 2004 Section 18 subsection 2, 19, 21-27, 33 and 34 Copyright Act 2004 also apply to the neighbouring rights *mutatis mutandis*.

### **I. *Transient Copying***

Section 33 Copyright Act 2004 permits the temporary reproduce of a work without the consent of the author and without remuneration if the reproduction of the work is an essential component of a technological process and the purpose of the reproduction is to ensure the sending of the work performed by the intermediary to the data network between third parties or lawful use, and if such reproduction has no permanent economic meaning.

In contrast to the Directive the words “transient or incidental [and] integral part” are missing. Beside this, the Directive requires that the sole purpose of the process is to “enable” the transmission or the lawful use and not to “ensure” it as the Copyright Act 2004 states. Moreover, the Directive demands that the act has no “independent economic significance” instead of no “permanent economic meaning”.

### **II. *Reprography***

Pursuant to Section 35 Copyright Act 2004, it is permitted to reprographically reproduce published works except from sheet music, for personal and official need without direct and indirect commercial purpose. This provision is broader than the Directive as it allows reproducing the work for official need. The provision is in accordance with Article 5 (3) (e) EUCD.

### **III. *Private Copying***

According to Section 34 paragraph 1 Copyright Act 2004 the reproduction for personal use without direct or indirect commercial purposes may be made of one copy of works, which includes lawfully acquired films or phonograms, as well as visual works.

In contrast to the Directive, the Copyright Act 2004 uses the word “personal use” instead of “private use”. It is difficult to estimate whether the deviation will have distorting effects though it should be noted that a personal use can be one within and outside private spheres, and the scope of the provisions is therefore more extensive; for instance, a personal use may be qualified as a use for research or other purposes even if such use is not additionally permitted under any additional exception.

### **IV. *Libraries and Archives***

Section 19 paragraph 1 recital 4 and Section 23 Copyright Act 2004 allow the reproduction of works for the needs of libraries and archives. Thereafter every library or archive shall be permitted to make one copy of a work by means of reproduction for

non-commercial purposes, if such copy is made to preserve a particularly valuable work or to replace for a particular library's or another library's or archive's permanent collection a copy which has been lost, damaged or become unusable and moreover, it is not possible to obtain such a copy in some other acceptable manner, and the reproduction is repeated in separate and mutually unrelated cases. In contrast to the Directive, this provision does not require public accessibility.

#### **V. *Broadcasters***

Pursuant to Section 19 paragraph 1 recital 8 and Section 27 Copyright Act 2004 a broadcasting organisation may make ephemeral recordings of works which the organisation has the right to use in broadcasting, if the broadcasting organisation makes such recordings on its own account for its own use.

Furthermore, recordings that have particular documentary or cultural or historical significance may be preserved in official archives without an agreement with the author of the work. Nevertheless, the use of such work requires the permission of the author.

#### **VI. *Educational and Research Purposes***

Article 5 (3) (a) EUCD had not been implemented. A similar provision dealing with educational and research purposes was contained in Articles 19 (1) (2) and 21 of the Act.

Section 21 paragraph 1 Copyright Act 2004 states that the title and the author of the work have to be indicated. Furthermore it is permitted to use communicated or published works or fragments of them in textbooks which are in conformity with educational standards, in radio and television broadcasts, in audio visual works, in visual aids and the like, which are specially created and used in the face-to-face teaching and research process in educational and research institutions for non-commercial purposes to the extent justified by the purpose of their activity.

Beside this Section 19 paragraph 1 recital 7 and Section 26 recital 2 Copyright Act 2004 permit the performance of a musical work in educational institutions in a face- to face teaching process with the participation of teachers and learners, if the audience comprises only the teachers and learners, as well as persons who are directly associated with the implementation of an educational programme.

This differs from the Directive as it does not require to indicate the source and a non-commercial purpose.

#### **VII. *Disabled People***

Section 19 paragraph 1 recital 3 and Section 22 Copyright Act 2004 state that without infringing the author's copyright and the duty to pay a remuneration a work can be reproduced in order that the visually impaired or the hearing- impaired may use it.

For that reason, organisations for the visually impaired and hearing impaired, as well as librarians which provide services to visually impaired and hearing impaired, shall be permitted to reproduce and distribute works for non-commercial purpose in a form perceivable by such impaired insofar as is necessary in the case of the relevant impairment. The provision is much narrower than Article 5 (3) (b) EUCD.

### **VIII. *Informational Purposes***

Section 19 paragraph 1 recital 1 Copyright Act 2004 permits to copy a work for informational purposes. This is specified under Section 20 paragraph 1 Copyright Act 2004. Thereafter the author and the work have to be indicated. Pursuant to Section 20 paragraph 1 recital 1 Copyright Act 2004 it is permitted to reproduce works communicated to the public and published in the form of quotations and fragments in news broadcasts and reports of current events to the extent justified by the purpose.

Furthermore Section 20 paragraph 1 recital 3 Copyright Act 2004 permits to fixate, to communicate to the public and to publish current events by photographic works. Broadcasting organisations may broadcast works which have been seen or heard in the course of current events, to the extent justified by the informatory purpose.

In regard to neighbouring rights, Section 54 Copyright Act 2004 permits the reproduction of short fragments which are included in news broadcasts and within reports on current events.

### **IX. *Scientific Research***

Pursuant to Section 19 paragraph 1 recital 1 Copyright Act 2004 in connection with Section 20 paragraph 1 recital 1 Copyright Act 2004 it is permitted to reproduce works communicated to the public and published in the form of quotations and fragments for scientific, research, polemical and critical purposes to the extent justified by the purpose.

The author and the work have to be indicated.

### **X. *Judicial Proceedings***

According to Section 19 paragraph 1 recital 5 and Section 24 Copyright Act 2004, the reproduction of a work is permitted to the extent justified, for the purposes of judicial proceedings. As this provision only covers judicial proceedings, it is much narrower than the Directive.

### **XI. *Speeches etc.***

According to Section 19 paragraph 1 recital 1 and Section 20 paragraph 2 recital 2 Copyright Act 2004 it is allowed to publish in newspapers, to broadcast or otherwise make known publicly given political speeches, addresses, announcements and other works in analogue form to the extent justified by the informational purpose. However, the work and the author have to be indicated.

In difference to the Directive, public lectures are not explicitly mentioned. Instead, the Copyright Act 2004 only covers political works. Furthermore, it only applies to analogues works and is not explicitly extent to oral works.

## **XII. *Religious Ceremonies***

Article 10 paragraph 1 recital 7 and Section 26 recital 1 Copyright Act 2004 permit the performance of a musical work in public during official and religious ceremonies to the extent justified by the nature of the ceremony.

This provision is narrower than the Directive as it only permits the performance of musical works.

## **XIII. *Architectural Works etc.***

Pursuant to Section 19 paragraph 1 recital 6 and Section 25 Copyright Act 2004 it is permitted to use images of works of architecture, photography, visual art, design, as well as of applied arts, permanently displayed in public places for personal needs and as information in news broadcast or reports of current events, or include in works for non-commercial purposes.

This does not apply to cases where the image of a work is an object for further repletion of the work, for broadcasting organisations or for the purpose of commercial use of the image of a work.

It is questionable if this is in accordance with Article 5 (3) (h) EUCD. As the Directive only applies to works such as works of architecture or sculpture, it is at least doubtful if photography and visual art should be covered. The provision is also narrower than Article 5 (3) (j) since the purpose is not qualified (i.e. for advertising exhibitions).

## **C. Compensation system**

Pursuant to Section 15 subsection 4 Copyright Act 2004 the author has the right to receive remuneration for permission to use his or her work and for the use of the work except in cases provided for by law. This right can be restricted in cases specified by the law (Section 18 paragraph 1 Copyright Act 2004).

Section 34 Copyright Act 2004 requires remuneration (blank tape levy) for the reproduction for personal use. The blank tape levy for reproduction for personal use shall be paid by manufactures and persons who import into Latvia equipment used in such reproduction and blank recording media. The act does not make any provisions as to whether the obligation also arises in the case of digital equipment.

Furthermore, Section 35 Copyright Act 2004 states that remuneration has to be paid to the author or publisher for reprographic reproduction. The remuneration for reprographic reproduction shall be paid by the manufactures of such equipment used for

reprographic reproduction, including the manufactures of scanners, and persons who import such equipment to Latvia.

Beside this Chapter VIII grants compensations based on the levy system to right holders of neighbouring rights. Section 54 (1) refers, in general, to the limitations as applicable to copyright works. In accordance with Section 54, the blank tape levy for personal copies applies likewise to all owners of neighbouring rights. In addition, a right to claim fair compensation exists with regard to educational and research purposes (Section 21 Copyright Act) and other purposes as specified in Sections 19, 22-27 and 33 Copyright Act.

The scheme is administrated solely on a collective basis (Section 63 paragraph 5 Copyright Act 2004). The collective rights management organisations are under the supervision of the Ministry of Culture (Section 67 Copyright Act 2004). Under the current law, the conflict between the levy system and the technological measures is ignored so far.

#### **D. Protection of Technological Measures**

Latvia implemented Article 6 (1) – 6 (3) EUCD. In terms of the technicalities of implementation, the Act does not provide for a discreet provision dealing with technological measures but has introduced a definition into the initial explanatory sections of the Act, and a subsequent prohibition on circumvention and commercial dealings in Article 68 (1) Copyright Act 2003 deals with definitions of copyright violations in general.

Pursuant to Section 1 (1) (19) Copyright Act, technological measures are any measures (technologies, devices or the components thereof) used by a right holder, as well as a maker of a database which are normally used in order to restrict or prevent such activities with an object of copyright or neighbouring rights, as well as a database, which are not authorised by the right holder, as well as the maker of a database. Technological measures are deemed effective where the right holder, as well as the maker of a database control the use of an object of copyright or neighbouring rights, as well as a database through the application of an access control or a protection process (with encryption, scrambling or other transformation of the object of copyright or neighbouring rights or database work or a copy control mechanism, which achieves the protection objective). These definitions copy the Directive almost literally.

The prohibited act is, according to Section 68 (1) (4) Copyright Act 2004, defined as the destruction or circumvention of effective technological measures used by the right holder, which were intended to restrict or not allow any activity with the copyright and neighbouring right object, or other activities with technological measures if such have occurred without the permission of the right holder. The Act thereby introduces an extremely broad notion. The act of circumvention is characterised as a violation of copyright as such. Given its systematic context as an act of copyright infringement and the use of the word “right” indicates that the application of technological protection measures is roughly equivalent to a positive exclusive right. The provision also asserts

only one precondition for a delict to be established, that is, the effect of technological measures to impede or disable “anything” in relation to protected subject matter. In addition, knowledge of the person circumventing is not required. The Act thus affords protection for virtually any type of access, copy and general use control technology which is applied in relation to a work or other subject matter. It neither requires at least a modicum of connection with a subsequent act of copyright infringement nor does it take into account the purpose of circumventing or the type of work protected.

In addition, the manufacture, importation, distribution, sale, lease, advertisement or use for other commercial purposes of such devices or the components thereof, as well as the provision of such services, which are directed towards the circumvention of effective technological measures or the destruction thereof are a violation of copyright and neighbouring rights (Section 68 (1) (5) Copyright Act 2004). It follows from the status of anti circumvention prohibition as a stand alone tort that the scope of prohibition on commercial dealings is simultaneously extended so as to cover any device which enables the act rather than facilitate copyright infringement. Practically, this prohibits acts such as the removal of regional encoding on DVD's.

The act makes partially reference to Article 6 (4) EUCD, though only in relation to certain specified limitations.

According to Section 18 (4) Copyright Act 2004, the user of the work in the cases specified in Section 20 paragraph 1 clause 1 (reproduction of works communicated to the public and published in the form of quotations and fragments for scientific, research, polemical, critical purposes, as well as use in news broadcasts and reports of current events to the extent justified by the purpose), Section 21 (use of communicated or published works or fragments of them in textbooks which are in conformity with educational standards, in radio and television broadcasts, in audio-visual works, in visual aids and the like, which are specially created and used in the face-to-face teaching and research process in educational and research institutions for non-commercial purposes. This does not permit the use of computer programs), 24 (judicial proceedings), and 27 (ephemeral recordings by broadcasting organisations) Copyright Act 2004 has the right to request that the author gives access to such works taking into account the restrictions of the right of an author if the user cannot implement these rights due to the effective technological measures used by the author.

The author may refuse to provide such possibility if the use of the work is contrary to the provisions of the three step test. If the user of the work and the author cannot reach an agreement in request of these provisions, they may apply to a mediator (Section 18 paragraph 5, Section 67<sup>1</sup> pp Copyright Act 2004). According to Section 67<sup>3</sup> paragraph 4 Copyright Act 2004 the application by the parties to a mediator shall not influence their right to apply to a court. Provided that an existing claim for remuneration under the existing levy scheme satisfies the three step test, it seems likely that in such cases right holders might be ordered to remove technological protection measures. It should be noted, however, that the aim of such mediation is to permit the parties to reach a



contractual agreement on terms of access. Nothing in the Act allows the inference that beneficiaries can do so on the basis of a positive right.

However, the current scheme of compensation does not take into account the presence of technological protection measures, and not all beneficiaries – in particular, disabled persons – are sanctioned to commence the proceedings foreseen.

The interface between technological protection measures and limitations is further complicated by Sec. 68 (2) Copyright Act, by virtue of which, in determining whether an action qualifies as an infringement of copyright or neighbouring rights, the restrictions of copyright or neighbouring rights specified in the Copyright Act shall be taken into account. The clause applies to all instances deemed as copyright infringement under 68 (1) Copyright Act and thus likewise applies to technological protection measures. Hence, a person who removes anti circumvention measures for purposes justified by an existing limitation might be able to rely on the applicability of limitations by way of defence. However, such result contradicts both the unlimited scope of the prohibition on circumvention, which does not take into account the question of copyright infringement, and would create the illogical result that beneficiaries of limitations for which the mediation procedure is not foreseen would not commit a violation. It appears that Article 68 (2) Copyright Act – which primarily maintains the status of limitations as defences with regard to infringements of economic rights (Article 68 (1) Copyright Act) – has been overlooked to the extent that it seems to rule out the meaning of circumvention.

Technological protection measures may thus be applied, in all other cases and on the basis of a statutory right, with a concurrent claim for compensation to be paid under the blank tape levy scheme. Although the Ministry of Culture has a watchdog function in supervising the collective administration of the levy scheme, it remains doubtful whether, under the current dogmatic scheme, the use of technological protection measures would indeed allow a derogation from claims for compensation. This is because the Act places emphasis on an understanding of technological protection measures as an additional right to regulate the use of works. The right holder thereby is granted a stand alone right in the use of technological protection measures with the effect to set up terms and conditions of such use, and in addition retains rights in exploitations of the work. Given that, in the cases for which a claim for remuneration can be made, the limitations only effects a certain type of commercial use (such as private copying), the right holder will potentially be able to rely on both rights (based on technological protection measures as well as exclusive economic rights). This would bar any finding for a need to balance the use of technological protection measures with exceptions on the basis that the right holder would be in a position to contractually rule out uses covered by a statutory license. In turn, right holders may arguably enforce compensation claims in cases where such use would be allowed.

Secondly, the applicability to databases and computer programs will create some complexities. With regard to databases, technological protection measures can be applied so as to restrict the use of both databases protected under copyright and the sui generis

right. In both cases, the lawful user has a right to use the database and the respective provisions (Articles 6 and 9 of Directive 96/9) and contractual clauses to the contrary are void. In case the right holder applies technological protection measures which not only govern access to the work but also the use of the work, contractual rights will be pre-empted since more restrictive terms and conditions may then be based upon the application of technological protection measures. With regard to computer programs, the implementation likewise makes it impossible to decompile or make back up copies if a protected computer program is protected by technological protection measures.

Unsurprisingly, therefore, the Act does not mention specifically Article 6 (4) (4) EUCD as regards the use of technological protection measures for online services. This was unnecessary because the rule is applicable, implicitly, to all uses of technological protection measures.

## **E. Rights Management Information**

The technicalities of implementing Article 7 EUCD reflect those used for transposing Article 6. According to Section 1 recital 9 Copyright Act 2004 rights management information are information provided by a right holder, as well as a maker of a database, which identifies the right holder, as well as the maker of the database and the object, and information regarding the terms and conditions of use of the object of copyright or neighbouring rights, as well as databases, as well as any numbers or codes that represent information.

This copies the Directive almost literally.

Section 68 paragraph 1 recital 2 Copyright Act 2004 deems an activity by which, without the permission of the right holders, electronic information regarding the management of rights attached by the right holders has been extinguished, amended or transformed, as violation of copyright and neighbouring rights.

Beside this pursuant to Section 68 paragraph 1 recital 3 Copyright Act 2004 activities by which an object of rights for which the electronic information regarding the management of rights has been extinguished, amended or transformed without permission is distributed, broadcast, communicated to the public or published is deemed a violation of copyright and neighbouring rights.

## **F. Sanctions**

Section 69 Copyright Act 2004 offers several civil law sanctions to protect the rights of the rights holders. Thereafter the right holders, collective management organisation and other representatives have the right to require the infringer to recognise their rights; to prohibit the use of their works; to require that the infringer renew the status prior to the infringement of these rights, and that the illegal activity be stopped or that creative work not be threatened; to require that the infringer compensate the losses, including lost

profits, or also to require that an infringer provide compensation pursuant to the discretion of the court; to require that the infringing copies be destroyed; and to require that intermediaries whose services have been used in order to infringe the rights of the right holders, or who have made it possible to perform such an infringement, shall perform relevant measures for the purpose of discontinuing the possibility of the infringer to perform such infringements. If the intermediary does not perform the relevant measures, the right holders have the right to bring an action against the intermediary. This is based on Article 8 (3) EUCD.

To protect their rights, right holders may resort to the courts. Section 69 Copyright Act 2004 provides several facilities to enforce these rights. If an action concerning the infringements of rights is submitted to the courts, the rights holder shall be except from the State fee.

In accordance to Section 70 Copyright Act 2004, upon identifying infringing copies, the police or another competent State institution shall seize them. In deciding the liability of the offender, a decision regarding the destruction of the infringing copies shall be taken. If the offender is not identified, a decision regarding destruction of the infringing copies shall be taken by the institution which seized them.

Pursuant to Section 71 Copyright Act 2004, depending on the nature of the infringement of copyright or of neighbouring rights and the consequences thereof, the infringer shall be held to liability in accordance with the law.

## XVII LITHUANIA

The Republic of Lithuania implemented the Directive by the law amending the law on copyright and related rights, No. IX-1355, 5 March 2003. The last parts of the amendment entered into force on 1 January 2004.

An official English translation of the amended copyright and related rights act is available<sup>239</sup>.

### A. Exclusive Rights

#### I. *Reproduction Right,*

According to Article 2 recital 1 Copyright Act 2003 reproduction means direct or indirect, temporary or permanent making by any means and in any form, including an electronic form, of a copy (copies of work), an object of related rights or sui generis rights (in whole or in part).

The exclusive right to authorise or prohibit reproductions is assigned to the author by Article 15 paragraph 1 subparagraph 1 Copyright Act 2003.

The same right is provided for producers of phonograms regarding phonogram (Article 54 paragraph 1 subparagraph 1 Copyright Act 2003), broadcasting organisations regarding the fixation of their broadcast (Article 56 paragraph 1 subparagraph 2 Copyright Act 2003) and producers of audiovisual work (Article 57 paragraph 1 subparagraph 1 Copyright Act 2003).

#### II. *Communication to the public*

Pursuant to Article 2 recital 29 Copyright Act 2003 communications to the public means the transmission to the public of a work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access it from a place and at the time individually chosen by them. Communication to the public of an object of related rights means any transmission to the public of an object of related rights, including the making of the sounds or expression of the sounds recorded in a phonogram audible to the public, except broadcasting.

Article 15 paragraph 1 subparagraph 8 Copyright Act 2003 gives the author the exclusive right to authorise or prohibit broadcasting, retransmission of a work as well as communication to the public of a work in any other way, including the making available to the public to the public of a work over computer networks (on the Internet).

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[http://portal.unesco.org/culture/fr/file\\_download.php/1bebf3afce5c3ba0aef5aac71883ec78Law\\_of\\_March\\_5\\_2003.pdf](http://portal.unesco.org/culture/fr/file_download.php/1bebf3afce5c3ba0aef5aac71883ec78Law_of_March_5_2003.pdf)

The same right is provided for producers of phonograms regarding to the phonogram (Article 54 paragraph 1 subparagraph 2 Copyright Act 2003), broadcasting organisations regarding their broadcast (Article 56 paragraph 1 subparagraph 5 and 6 Copyright Act 2003) and producers of audiovisual work (Article 57 paragraph 1 subparagraph 4 Copyright Act 2003)

### **III. *Distribution Right, Article 4 EUCD***

Article 15 paragraph 1 subparagraph 5 Copyright Act 2003 gives the author the exclusive right to authorise or prohibit any distribution of the original or copies of a work to the public by sale, rental, lending, or by any other transfer of ownership or possession, as well as by exporting and importing.

The same right is provided for producers of phonograms regarding to the phonogram (Article 54 paragraph 1 subparagraph 4 Copyright Act 2003), broadcasting organisations regarding the fixation of their broadcast (Article 56 paragraph 1 subparagraph 7 Copyright Act 2003) and producers of audiovisual work (Article 57 paragraph 1 subparagraph 3 Copyright Act 2003)

The principle of community wide exhaustion does not apply: upon the first sale or other transfer of the original or copies of a work into the ownership in the Republic of Lithuania by the author or his successor in title (or with his consent), the exclusive right of distribution of the work or its copies which are lawfully in circulation shall expire (be exhausted) in the Republic Lithuania.

A corresponding provision for the phonogram producer (Article 54 paragraph 3 Copyright Act 2003), broadcasting organisations (Article 56 paragraph 3 Copyright Act 2003) and producers of audiovisual work (Article 57 paragraph 1 subparagraph 3 Copyright Act 2003) exists.

## **B. Exceptions and Limitations, Article 5**

Section 4 Copyright Act 2003 contains a list of applicable exceptions and limitations. The transposing instrument has made ample use of the non-mandatory exceptions and limitations under the Directive, and largely very few deviations can be observed. Deviations, if ascertainable, mainly concern departures from the text of individual provisions under the Directive. In contrast to a number of other member states, Lithuania has faithfully restricted the scope of exceptions and limitations to the purposes foreseen. The law does not go beyond that scope in relation to the subject matter covered. All limitations likewise apply to neighbouring rights.

The three step test has faithfully been implemented by Article 19 Copyright Act 2003, which asserts that any limitation on economic rights shall be permitted exclusively in cases provided for in the Copyright Act 2003. They must not conflict with a normal exploitation of a work and must not prejudice the legitimate interests of author or other owner copyright.

Limitations of related rights are equivalent to those mentioned below (Article 58 Copyright Act 2003).

### **I. *Transient Copies***

According to Article 29 Copyright Act 2003 it is permitted to carry out temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable an efficient transmission in a network between third parties by an intermediary, or a lawful use of a work to be made (when it is permitted by the owner of copyright or is not restricted by the copyright act), and which have no independent economic significance.

The Copyright Act 2003 modifies the exception as understood within the context of the Directive by adding the word “efficient”. This deviation will not significantly transform the scope of the exception though it may cause some reduction in scope in relation to certain technically induced copies which may not strictly be qualified as enhancing efficiency of the network transmission. It certainly expressly excludes any forms of temporary copies which are made in the recipient computer’s memory, that is, temporary (rather than transient) reproductions which enable access to the work following transmission.

### **II. *Reprography***

Article 23 paragraph 1 Copyright Act 2003 permits the reproduction on paper by means of reprography of a published Article or any short work, or a short extract of a writing, with or without illustrations if it is not for direct or indirect commercial advantage. The term reprography is narrowly defined as “reproduction on paper for private use by means of reprography, effected through the use of any kind of photographic technique or some other process having similar effects”. This will include the use of photocopying machines as well as scanners, though in the latter case it is arguable whether the subsequent storage of a scanned document in computer memory can be exempt under Article 23 Copyright Act 2003. In contrast to the initial act of scanning a document by making a visual image of the work, a subsequent storage would be one in electronic form. The question raised is whether such subsequent storage is “similar” within the meaning of Article 23 Copyright Act 2003 or whether it would fall within the context of the general private copying exception inserted in Article 20 (1) Copyright Act 2003 (see below).

The reproduction has to be a single act. Repeated acts of such reproduction shall be permitted if they are done on unrelated occasions. The right holder shall receive a fair compensation.

This provision is narrower than the Directive as it only allows single copies. Besides this, it does not mention sheet music.

### **III. *Private Copying***

Article 20 paragraph 1 clause 1 Copyright Act 2003 allows a natural person to reproduce, exclusively for his individual use, not for direct or indirect commercial advantage, in a single copy a work published or communicated to the public in any other mode, where the act of reproduction consists of a single act. According to clause 2, this does not cover reprography (reproduction on paper for private use by means of reprography, effected by the use of any kind of photographic technique or some other process having similar effects). Acts of reprography are thereby expressly excluded from the private copying clause and dealt with as *lex specialis* in Article 23 Copyright Act 2003 exclusively. The provision arguably does not permit another person to make such copies on behalf of the person qualified and also excludes any privileges in relation to on demand delivery of protected works.

### **IV. *Libraries, Archives, Educational Institutions etc.***

A reproduction on paper by means of reprography is permitted of a work kept in publicly accessible libraries, educational establishments, museums or archives, except where the work was made available to the public over computer networks, and if it is not made for direct or indirect commercial advantage.

In addition to this, the reproduction is only permitted for the purpose of preservation or replacement of a lost, destroyed or rendered unusable copy from the funds or collections of said institution, or for the purpose of replacement of a lost, destroyed or unfit for use copy from the permanent collection of another similar library or achieve. It has to be impossible to obtain such a copy by other acceptable means. The act of such reproduction has to be a separate single act. Repeated acts of such reproduction shall be permissible if they are done on unrelated occasions, Article 21 paragraph 1 clause 2 Copyright Act 2003.

As required by the Directive the Copyright Act 2003 allows the reproduction by these institutions only in special cases. The provision is narrower than the Directive as it limits the reproduction medium to paper and the amount of reproductions.

In effect, the transposition of Article 5(2)(c) EUCD is rather narrow as it, fundamentally, only privileges such copies for replacing unattainable items. It does not permit the making of copies for the purpose of archiving existing materials. The provision also makes it clear that copies which have been made available online. This excludes the making of copies from works transmitted online, whether under an existing agreement or not.

### **V. *Broadcasts***

In accordance with the Directive, Article 29 paragraph 1 subparagraph 2 Copyright Act 2003 allows to make ephemeral recordings of a work made by broadcasting organisations or a person acting on behalf of and under the responsibility of the

broadcasting organisation by means of their own facilities and for their own broadcasts. Such recording must be erased after thirty days. Recordings of an exceptional documentary character may be transferred to official State archives for preservation.

#### **VI. *Teaching and Scientific Purposes***

Article 22 paragraph 1 subparagraph 1 Copyright Act 2003 permits the reproduction for teaching and scientific research purposes of short published works or a short extract of a published work, by way of illustration, in writings, sound or visual recordings, provided that this is related to study programs and does not exceed the extent justified by the purpose. However, the source has to be indicated when possible.

#### **VII. *Disabled People***

Article 22 paragraph 1 subparagraph 2 Copyright Act 2003 permits the reproduction for non-commercial educational and scientific research purposes of lawfully published works in the form intended for people having hearing or visual impairments, to the extent required by the specific disability, with the exception of works specially created for this purpose. Thereby, the law combines the limitations under Article 5 (3) (a) and 5 (3) (b) EUCD into a rather narrow exception qualified by an educational or scientific research purpose.

#### **VIII. *Current Events***

Article 24 paragraph 1 subparagraph 1 Copyright Act 2003 permits reproductions by the press, communication to the public or making available of published Articles on current economic, political or religious topics or of broadcast works of the same character, in cases where such use is not expressly reserved by the authors or other owners of copyright in such works, and as long as the source, including the author's name is indicated. This literally implements Article 5 (3) (c) EUCD.

Additionally, Article 24 paragraph 1 subparagraph 2 Copyright Act 2003 permits the use of literary and artistic works the place of performance or the display of which renders information on public events or current events in the press, radio or television, provided that such use is justified by the informatory purpose and constitutes additional informational material, and the source, including the author's name, is indicated, unless this turns out impossible. This implements the second part of Article 5 paragraph 3c EUCD. In difference to the Directive, the works and other subject matter in connection with the reporting are specified.

#### **IX. *Quotations***

Pursuant to Article 21 Copyright Act 2003 it is permitted to reproduce a relatively short passage of a published work or a work made available to the public, both in the original and translated language, in the form of a quotation in another work, provided that such reproduction is compatible with fair practice and its extent does not exceed that justified by the purpose. The author and the source have to be indicated.



This implementation narrows the Directives provision as it only allows a “relatively short passage” explicitly. On the other hand, it is broader as it does not require a purpose such as criticism or review.

Beside this Article 2 subparagraph 6 Copyright Act 2003 defines that quotation means a relative short passage cited from another work to demonstrate or to make more intelligible author’s own statements, or to refer to the views or thoughts of another author in authentic wording. However, Article 21 Copyright Act 2003 does not refer to Article 2 recital 6 Copyright Act 2003 directly.

#### **X. *Public Security***

Article 27 Copyright Act 2003 permits to reproduce and communicate a work to the public for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

#### **XI. *Use of works in newspapers***

Pursuant to Article 24 paragraph 1 subparagraph 3 Copyright Act 2003 the use of a work in newspapers or periodical, or communication to the public in any other mode of political speeches, reports, lectures or other works of a similar nature delivered in public, as well as speeches delivered during court proceedings, to the extent justified by the informatory purpose is free. The source, including the author’s name has to be indicated, unless this turns out to be impossible.

In contrast to Directive, Article 24 (1) (3) Copyright Act `2003 provides examples about the mode of the publication and also extends to reports and speeches delivered in court proceedings. These examples are still covered by the Directive.

#### **XII. *Religious Celebrations***

According to Article 26 Copyright Act 2003, it is allowed to reproduce a work during religious celebrations and to make it available to the public during this celebration.

#### **XIII. *Architectural Works etc. in Public Places***

Pursuant to Article 28 paragraph 1 subparagraph 1 Copyright Act 2003 it is permitted to reproduce and make works of architecture and sculptures available to the public, if they are made to be located permanently in public places. This does not apply to exhibitions and museums. Furthermore, this shall not apply when the work is the main subject of representation in the reproduction and when this is done for direct or indirect commercial advantage.

#### **XIV. *Artistic Works***

Faithful to the wording of Article 5 (3) (i) EUCD, Article 24 paragraph 1 subparagraph 4 Copyright Act 2003 permits the reproduction and communication to the public for the

purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use.

#### **XV. *Caricature and Parody***

According to Article 25 Copyright Act 2003, it is allowed to use a work for the purpose of caricature and parody.

#### **XVI. *Demonstration and Repair***

Article 24 b(1) (5) Copyright Act 2003 implements Article 5 (3) (l) EUCD literally (“reproduction and communication to the public of a work in connection with the demonstration or repair of equipment”).

#### **XVII. *Use of plans etc. for construction purposes***

Article 27 paragraph 1 subparagraph 2 Copyright Act 2003 permits the use of a project, design, sketch or model of a building or any other construction works for the purpose of reconstructing this building or construction works. This provision differs from Article 5 (3) (m) EUCD in that it slightly restricts the privilege by the providing types of subject matter qualifies as artistic work (rather than broadly referring to artistic works).

#### **XVIII. *Research or Private Study***

Article 22 paragraph 1 subparagraph 3 Copyright Act 2003, close to the wording of Article 5 (3) (n) EUCD, allows the use for the purpose of research or private study of the works kept in publicly accessible libraries, educational establishments, museums or archives, by communication or making them available to the public by dedicated terminals on the premises of said institutions. In contrast to the Directive, it is not required that the works are only made accessible to “individual members of the public”.

### **C. Compensation System**

The transposition process has introduced, in accordance with the Directive, a general claim for “fair compensation”. According to Article 15 paragraph 2 Copyright Act 2003 the author shall have the right to receive remuneration for each mode of the exploitation of the work related to author’s economic rights.

Article 20 Copyright Act 2003 states that the author shall have the right to receive a fair compensation if the work is reproduced for personal use (that is, not for reprography). This compensation must be paid by producers and importers of any blank audio or audiovisual media.

The right to claim remuneration for acts of reprography is vested, remarkably, in both the author and the publisher, Article 23 paragraph 3 Copyright Act 2003. The clause asserts that both the author and the publisher shall be entitled to fair compensation for

reproduction on paper by means of reprography of works. Such compensation shall be paid by the person providing fee-paying services of reprographic reproduction.

The compensation shall be collected, distributed and paid by the association of collective administration of copyright approved by the institution authorised by the Government (Article 20 paragraph 5 clause 3 and 23 paragraph 3 clause 4 Copyright Act 2003, Article 65 paragraph 4 Copyright Act 2003).

According to Article 20 paragraph 5 and 23 paragraph 3 clause 3 Copyright Act 2003 the Government shall take account of application or non- application of technological measures when it establishes the amount of the compensation. Pursuant to Article 20 paragraph 5 clause 1 Copyright Act 2003 the amount of compensation and the conditions of distribution and payment thereof shall be established by the Government after consultation with associations representing producers and importers of the media and associations of collective administration of copyright. At present, there is no indication as to whether such consultations have taken place or whether any agreement has been reached.

#### **D. Technological Protection Measures**

The Lithuanian Copyright Act deals with technological protection measures in Article 74 Copyright Act 2003. Article 75 Copyright Act 2003 provides limitations on such protection. The implementation follows the text of Article 6 EUCD almost literally.

Article 74 no. 1 Copyright Act 2003 asserts that the use of technological protection measures must be associated, in order to be protected, with either the enforcement of protection of subject matter protected under the Act. Thereby, the law expresses that such measures must be used in accordance with the general protection afforded by copyright and related rights. Liability will arguably not be incurred in cases where the work protected is in the public domain. It is not clear whether, given the wording of the opening sub-paragraph, the law would sanction acts of circumvention intended for non-infringing uses. In most cases, this issue will not arise given the broad definition of the reproduction right. Cases of circumvention resulting in the making of a temporary copy in computer memory are expressly defined as reproductions. It would follow that technological protection measures are protected in almost all cases which require the use of digital equipment. However, in certain cases such as access protection on DVD's the implication of the umbrella clause may be assessed in a different way. In addition, in contrast to Article 6 EUCD, the law also mentions that technological protection measures may be used for purposes of enforcement of copyright protection.

Technological protection measures may be used broadly in all cases concerning works and related rights as well as for the protection of the database sui generis right.

The assertion of the law is that technological protection measures “may” be used. This reiterates a close connection with purposes for copyright protection. In effect, this purports a rather restrictive notion in that the use of technological measures does not, in itself, give a positive right. In thereby follows that Lithuania has taken a narrow doctrinal

approach under which an act of circumvention bars any finding of subsequent copyright infringement does not qualify as a tort in its own right.

Article 74 (1) Copyright Act 2003 defines technological protections as any technology, device or component which, in the normal course of operation, are designed to prevent or restrict acts, in respect of objects of copyright, related rights or sui generis rights, which are not authorized by the owners of copyright, related rights or sui generis rights. Article 74 (2) Copyright Act 2003 defines effectiveness as instances where the use of a protected object of copyright, related rights or sui generis rights is controlled by the owners of the rights through application of an access control or protection process (as encryption, scrambling or other transformation of the object of the rights) or a copy control mechanism, which achieves the protection objective.

The definition makes it clear that both access and copy control mechanisms are included, but reiterates that the purpose of such use must strictly be related to the presence of a copyrighted work or other protected subject matter, and that the application of such measures must functionally be coupled with achieving such objective.

Article 74 (2) Copyright Act 2003 contains a remarkable derogation in that technological measures must not prevent the normal operation of electronic equipment and its technological development. It is noteworthy that the provision does not relate to the work protected but to the electronic equipment used. One potential result is that a CD containing copy control mechanisms will arguably be exempt from protection under Article 74 (2) Copyright Act 2003: if the provision is construed widely, a CD which, due to the application of copy control mechanisms, does not run on certain players, may be cracked so as to allow its operation. If construed more narrowly, the provision will permit such circumvention at least in cases in which a copy control mechanism is likely to cause damage to a player. Furthermore, the exception made will cause a finding that the use of copy control mechanisms may render a purchased carrier as faulty under general civil law, and will also have the effect that dealings in circumvention devices which allow a player to function are permissible.

Sec. 74 (3) prohibits the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he seeks to circumvent the technological measures applied by the owners of copyright, related rights or sui generis rights, shall be regarded as violation of technological measures. This implements Article 6 (1) EUCD literally but is qualified, as noted, to the extent that the act of circumvention results (or, as a minimum requirement, is likely to result) in acts of copyright infringement.

Sec. 74 (4) implements Article 6 (3) EUCD and provides that (1) the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components which are primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of, any effective technological measures, or which have only a limited commercially

significant purpose or use other than to circumvent; (2) the provision of services related to the circumvention of technological measures.

Sec. 75 (5) declares the foregoing sub-paragraphs inapplicable in certain cases related to the development or use of any means of circumventing a technological measure that is necessary to enable a lawful user of a computer program to make a back up copy. In that respect, Sec. 74 (5) refers to Article 30 (2) Copyright Act 2003, according to which a back up copy may be made in the case of a lawfully acquired computer program in the event that the acquired copy has been lost, destroyed or become unfit for use. Remarkably, the provision only relates to one specific purpose of making back up copies in order to replace the original program. It does not permit the circumvention of measures which are applied to computer programs for other purposes such as the use of a back up copy for error correction or for purposes of observing, studying or testing the program. It arguably follows that a lawful user of a computer program cannot, by contractual agreement, be restrained from removing anti circumvention technologies for the purpose not covered under Article 75 (3) and (4) since Article 30 (5) declares such contractual clauses, in accordance with the Directive on the Legal Protection of Computer Programs, void. Article 75 (5) Copyright Act 2003 likewise makes the prohibition under Article 74 (3) and (4) Copyright Act 2003 inapplicable in case of decompilation of a computer program.

Article 74 (6) asserts that paragraphs 3 and 4 shall also apply to technological measures which are designed to ensure the right of users to benefit from the limitations set forth in paragraph 1 of Article 75 of this Law, and which are applied voluntarily by the owners of copyright, related rights and sui generis rights.

Article 75 Copyright Act 2003 implements Article 6 (4) EUCD. Technically, the provision is devised as a limitation on the application of technological measures. The limitations mentioned do not apply with respect to online services based upon contractual agreements, Article 75 (2) Copyright Act 2003.

Article 75 (1) provides certain limitation in relation to beneficiaries of the exceptions and limitations under Articles 20 (1), 22 (1), 22 (2), 23 (1), 27 (1) 29 (1) (2), 58 (4 to 8), 63 (1).

The implementation of Article 6 (4) foresees that “the users of the rights must be provided with conditions or adequate means (i.e. decoding devices and other) enabling them to use legitimately accessible objects of copyright, related rights or sui generis rights to the extent necessary for the users of the rights to benefit from the limitations of copyright, related rights and sui generis rights provided for their interests”. This arguably affirms a positive right of such users to actually be provided with access and copy devices for the purposes covered rather than referring to a contractual solution based upon voluntary measures.

In addition, Article 75 (3) Copyright Act 2003 requires right holders who “desire” to apply measures to -

“furnish information to the institution authorized by the Government about a measure to be applied, and other information related to the implementation of such measure, including information about ongoing negotiations between owners of the rights, users of the rights and other interested persons. The institution authorized by the Government shall have the right to appoint its representative to take part in those negotiations”.

Article 75 (4) Copyright Act 2003 foresees, in cases where the right as asserted under Article 75 (3) Copyright Act 2003 cannot be enforced by voluntary means, a mediation procedure to be conducted before the Council for mediation. Under such mediation process, voluntary agreements can be entered into which then might contain certain restriction of use. If no agreement is reached, the parties have the right to settle the dispute before ordinary courts, over which the Vilnius regional court has exclusive jurisdiction.

The provision is not entirely clear about the relationship between rights of beneficiaries and right holders applying technological measures. Following the text of the law, limitations (as enumerated) are perceived to be “rights”, and accordingly the act makes provision for a positive and enforceable right to have such measures removed. Beneficiaries of limitations are not liable to pay compensation in these cases (this is collected by way of levies to be imposed on manufacturers of carriers), and the act makes no specific provision as to when and how right holders applying technological measures can claim fair compensation but for the very broad position that the application of technological protection measures shall be taken into account in relation to the actual amount of fair compensation to be paid. The current structure of the Act permits the conclusion that right holders are, if confronted with claims by beneficiaries, obliged to make certain that the beneficiaries can have access but this is not qualified, in accordance with the nature of Article 75 (3) Copyright Act 2003, by the condition that some form of remuneration scheme is actually in place. The scope of Article 75 (3) Copyright Act 2003 thereby is uncertain. It seems relatively clear that in case right holders already claim compensation, there is no scope for further agreements between right holders and beneficiaries that would pertain to additional contractual agreements based upon payment for access in relation to permitted uses. In that case, it seems inevitable that mediators and – ultimately – courts will be obliged to order right holders to enable access and copying. If a fair compensation scheme is absent, the situation appears complicated in that a solution has to be found which balances two competing claims, and the law makes no preference for either the right to enjoy benefits under Article 75 (3) Copyright Act 2003 nor the right to claim fair compensation from manufacturers in the cases provided. It is in this case that beneficiaries will probably have to pay a contractual fee in order to avail themselves of the privileges mentioned, but this is uncertain since the benefits are formulated as positive rights with an accompanying obligation to remove TPM’s. Alternatively, the court may well find that the right to make use of certain limitations supersedes the interests of right holders.

## **E. Rights Management Information**

Article 7 EUCD was implemented. 'Rights management information' is defined in Article 2 (13) Copyright Act 2003 as

“...any information, submitted by owners of copyright, related rights or sui generis rights, which identifies a work, an object of related rights or sui generis rights, owners of such rights, or information about terms and conditions of use of a work, an object of related rights or sui generis rights, as well as any numbers, graphic marks or codes that represent such information”

The provisions prohibit the removal of rights management information without the permission of the owner of the rights and the use a work or an object of related rights or sui generis rights and distribution thereof without the licence of the owner of such rights or the import, export, distribution, transportation or keeping for commercial advantage of infringing copies of works, objects of related rights or sui generis rights when the rights management information is removed or altered without authority, if the person knows, or has reasonable grounds to know, that by doing so he is inducing, enabling, facilitating or concealing an infringement of the rights protected under the copyright act, Article 76 Copyright Act 2003. The provisions on DRM's reflect a faithful transposition of Article 7 EUCD.

## **F. Sanctions**

The Act does not provide for specific remedies and sanctions in the case of a violation of the provisions on technological measures and Rights Management Information. Accordingly, the general remedies under the Copyright Act apply. These are specified as including civil and criminal sanctions. Civil sanctions (Article 77 Copyright Act 2003) may be brought for the enforcement of recognition of rights, injunction to terminate unlawful uses; prohibition of actions because of which the rights may be actually infringed or damage may be actually caused; redresses of the infringed moral rights; exaction of unpaid remuneration for unlawful use of objects of copyright, related rights or sui generis rights; compensation for property damage, including the lost income and other expenses, and in special cases non- pecuniary damage, as well; payment of compensation; seizure and, in case a final court decision is made, taking out of circulation in such a way that damage would not be made to the right holder and protection of his rights would be ensured, transfer to the aggrieved at his request or destruction at the expense of the offender. The Act also contains a general clause under which other legislative measures for the protection of violated rights can be enforced.

Article 81 Copyright Act specifically deals with provisional measures.

Administrative and criminal liability for violations of copyright, related rights and sui generis rights are defined by the Code of Administration Offences and the Criminal Code, Article 83 Copyright Act 2003.

## XVIII LUXEMBOURG

Luxembourg implemented the Directive on April 18, 2004 by amending the Law on Author's Rights, Related Rights and Databases (Loi du 18 Avril 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948)<sup>240</sup>. The Bill was presented to parliament following the EU Commission's reasoned opinion on 5 May 2003. Prior to the implementation, Luxembourg acceded to the 1996 WIPO Treaties on 18 April 2001<sup>241</sup>. A new Part 7*bis* of the Act deals with the protection of technological measures and of rights-management information.

### A. Exclusive Rights

The Act already contained the exclusive rights as required under the Directive following amendments in 2001. Specific amendments were made during the implementation process with regard to broadcaster's rights.

The reproduction right – which was not amended – refers to the author's exclusive right of reproducing his work in any manner or any form, Art. 3 (1). The provisions does not specifically deal with temporary or transient copies and in that respect appears slightly narrower than Article 2 EUCD.

The distribution right, which formerly formed part of a broader droit de divulgation, has been expressly inserted under Art. I, 2° of the implementing instrument. The distribution right is contained in a new Article 3 (5) Copyright Act and vests in the author the exclusive right to authorize, by sale or otherwise, the distribution of the original of his work or copies thereof to the public. The principle of community exhaustion applies. The provision implements Article 4 verbatim.

The right of communication to the public and making available, as noted, already existed following the accession to the WCT and WPPT 1996 in 2001. The law uses the exact wording of Article 5 WCT. The act was amended so as to introduce an exclusive right of making available for broadcasters (Article 53 Copyright Act). Thereby, acts of public communication under Article 3 EUCD are now granted as a fully fledged exclusive right rather than a right to consent.

All exclusive right mentioned are also granted to performing artists, phonogram producers, film producers and broadcasters.

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<sup>240</sup> <http://www.legilux.public.lu/leg/a/archives/2004/0612904/0612904.pdf#page=2>

<sup>241</sup> <http://www.legilux.public.lu/leg/a/archives/2001/0503004/0503004.pdf#page=2>.



## **B. Exceptions and Limitations**

The implementation process was significantly impeded by debates on the scope of exceptions and limitations to be implemented or amended. In particular, parliament suggested a list of fourteen limitations applied to copyright and nine further limitations in relation to neighbouring rights. These limitations were foreseen to, inter alia, include broad exception for so-called Internet uses and would have exempted downloads onto electronic media of lawfully acquired works provided this was done to access or use the work. Similarly, an exception for small businesses was foreseen. The approach taken in Luxembourg is clearly favouring consumers and users and the initial proposal suggested the transposition of the entire set of limitations provided by the Directive. The exceptions were finally drafted so as to align more faithfully to with Article 5 EUCD, a response precipitated by the Luxembourg Chamber of Commerce which petitioned for a higher level of protection in favour of right holders.

The Act contains an express reference to three step test, inserted at a very late stage, Article 10 (2) Copyright Act . Likewise, Article 13 TRIPs forms part of the legislation and is thereby directly applicable.

The envisaged incorporation of exceptions relating to reprography, social institutions, ceremonies, incidental inclusion, advertisement of exhibitions and sales, demonstration and repair and reconstruction of buildings had been removed from the initial proposal. One of the most remarkable changes to the law concerns the withdrawal of the mandatory character of limitations, as was suggested to be implemented in a new Article 10ter.

The final instrument implementing the Directive introduced an amended Article 10 into the law which contains most of the non-mandatory exceptions. The implementation is in general faithful to the wording of the Directive, albeit with minor discrepancies without any particular significance.

The limitations mentioned below expressly apply, according to Article 46, to related rights as far as the exceptions relating to transient copies, private copying, quotations, current events, parodies and caricature, broadcasters recordings, libraries and archives, teaching and scientific research are concerned. Article 46 applies *mutatis mutandis* to the remaining limitations under Article 10, including thus the three step test. Art. 55 incorporates Article 46 so as to make the limitations similarly applicable to broadcasters' rights.

### **I. *Transient Copies***

Article 10 (5) Copyright Act literally transposes Article 5 (1) EUCD. The act does not make it clear as to when a use is lawful within the meaning of the second alternative.

## **II. *Private Copying***

A private copying exception has been introduced in Article 10 (4). The limitation applies, in accordance with Article 5 (2) (b) EUCD, only with respect to strictly non-commercial private uses. The limitation is subject to “fair compensation” (see below).

## **III. *Libraries, Museums and Archives***

Article 10 (10) implements Article 5(2)(c). it permits the reproduction of a published work accessible to the public in a library, an educational establishment, a museum or archive if such establishment either does not pursue an economic or commercial aim for purposes of preservation. The provision is subject to the three step test.

## **IV. *People with Disabilities***

Article 10 (11) implements Article 5(2) in relation to people with disabilities. The beneficiaries mentioned are privileged with respect to reproduction and communications to the public directly related to the disability. Again, the provision transposes the text of the Directive verbatim.

## **V. *Quotations***

Article 10(1) Copyright Act 2004 permits the making of short quotations. The provision details that such must be in accordance with fair practice, which is taken so as to mean for non-commercial purposes. The use must be justified by the “critical, polemical, educational, scientific or informative character” of the work in which they are incorporated.

## **VI. *Teaching and Scientific Research***

Article 10 (2) implements the limitations on teaching and scientific research for the sole purpose of illustration. The use must be justified by the non-commercial purpose and consistent with fair practice. The source and author need to be indicated. The limitation only applies to short extracts of a work.

## **VII. *Reporting of Current Events***

Article 10 (3) deals with reporting of current events. The provision is strictly limited to informative purposes and permits both the reproduction and communication to the public. The same disclaimer as under Article 5(3) EUCD applies.

## **VIII. *Research or Private Study***

Article 10 (14) permits the public communication for purposes of research and private study. The exception thereby allows the transmission of works not subject to purchase or licensing terms which are contained in existing collections. The limitation can only be

exercised on site (i.e. in the confines of the physical location) and only by publicly accessible libraries.

#### **IX. *Caricature, Parody, Pastiche***

Article 10 (6) exempts caricatures, parodies and pastiches. This is strangely limited to uses which are intended to « make fun ». of the parodied work.

#### **X. *Works in Public Places***

Article 10 (7) Copyright Act literally reflects the limitation on works in public places.

#### **XI. *Official Documents***

According to Article 10 (8), official texts of authorities and official translations as well as speeches made in “deliberative assemblies” public court hearings and political meetings may be used without restriction .

#### **XII. *Broadcasters***

The right of broadcasters to make ephemeral recordings of works is enshrined in Article 10 (9) Copyright Act. The right is subject to the recording being made with the broadcasters own facilities and for its own broadcasts. In addition, Article 10 (9) contains an exception for preserving broadcasts including works provided the broadcast has an exceptional documentary character. This is, above Article 5(2)(d) EUCD), subject to specific conditions to be imposed by the Grand Duchy.

#### **XIII. *Public Security***

Article 10 (12) contains a limitation on the use of short extracts which implements Article 5(3)(e) without deviations.

### **C. Compensation Scheme**

One of most eagerly debated issues concerned the regulation of fair compensation. Initially, it was proposed to make use of the flexibility provided by the directive in order to maintain the traditional system. The proposal envisaged to not introduce a levy scheme (applicable to private copying only), as it was feared that the introduction of such system would be too burdensome to administer (Bill. Parl. Doc. 5128-0). This was eventually relinquished and a general right to receive fair compensation was introduced.

There is no legislative response as to how such system will be set up. At present, the text of the Copyright Act merely refers to fair compensation without detailing whether this pertains to a positive right of remuneration. There is, likewise, no levy scheme in operation which provides for collective administration of levies paid by manufacturers. Accordingly, the issue is open.

The parliamentary debates show, however, that there is a strong tendency to exclude any right of fair compensation in case Rights Management Information technologies have been applied.

## **D. Technological Protection Measures**

Article 6 and 7 EUCD have been implemented in a new Part 7bis of the Copyright Act (Article 7ter – 7octies). The provisions are structured in a manner reflecting the approach under the Directive.

### **I. *Subject Matter and Definition***

Protection for technological measures is afforded to all types of protected subject matter including related rights and the database maker right, but does not apply to computer programs (see below). Sec. 71ter implements Article 6(3) and defines technological protection as any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or performances, which are not authorized by the right holder of any copyright or any right related to copyright as provided for by law or the database sui generis right. The definition thereby refers to both access and copy control technologies. Usage of the terms “works or performances” (“les oeuvres ou prestations”) does not indicate that protection is afforded only with regard to creative works or performers rights.

### **II. *Effectiveness***

Effectiveness is defined in a fashion closely following the Directive. TPM’s are deemed effective “where the use of a protected work or performances is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or performances or a copy control mechanism, which achieves the protection objective”.

### **III. *Acts of Circumvention***

Protection against individual acts of circumvention (Article 6(1) EUCD) is expressly referred to in Sec. 71quater, which provides that the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective, is restricted. In addition, Article 6(2) EUCD has been implemented in Sec. 71quater which, again, closely resembles the Directive. Accordingly, the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services is also restricted if these devices or services are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

The explanatory memorandum points out that protection is afforded only with respect to those technologies which enable copyright infringement. In this respect, it was suggested that the circumvention of regional encoding on DVD's would not fall within the scope of Sec. 71ter if it were circumvented in order to view and otherwise access the contents. This position significantly departs from most other member states in that a clear nexus between copyright infringement and circumvention is required. This not only denotes that the subject matter barred from access must be protected. It also alters the status of Sec. 71quater Copyright Act in that the act of circumvention, as such, does not constitute a tort in the absence of an eventual copyright infringement. The legal sanctions, which refer to the act of circumvention as constituting a tort within the meaning of Articles 1382 and 1383 of the Civil Code and also to penal sanctions (see below), will therefore not apply in cases in which access by cracking anti circumvention devices is achieved for purely non-infringing uses, which includes, for instance, access for the purpose of viewing, reading or listening to a work. In case copyright infringement ensues, the question arises which legal sanctions will apply since in this case the act of circumvention is considered a tort. It follows that a right holder who applied technological protection measures may be able to rely on alternative legal actions under both general tort law and specific copyright infringement actions.

In addition, the position as indicated in the explanatory memorandum leaves a number of blind spots. Even if the prohibition does not apply with regard to acts related to merely enjoying the work, it must be noted that the act of cracking access control mechanisms in a digital environment will necessarily result in the making of temporary (RAM) copies, the status of which is uncertain given the more restricted wording as used in relation to the reproduction right. Likewise, given the extension to databases under the database maker right, it is conceivable that an act of circumvention will violate the database maker right (such as in the case of a CD-ROM containing a protected multimedia work) though not result in infringement of copyright, whereas the same act will be permissible in cases such as computer games potentially not protected under the database maker right. The proposed restriction to infringing uses thereby causes difficulties in assessing whether (1) the act of circumvention has factually resulted in an act infringing copyright and (2), in case no such infringing use can be established, whether some element of intention must be proven. It should also be noted that this has consequences for the prohibition on commercial dealings in anti circumvention devices in that it potentially permits such dealings etc. for technologies – such as decoding software used for cracking regional codes – which are intended to make a work accessible without providing the means to make further copies or to additionally remove copy control devices. It naturally follows that this significantly reduces the scope of Sec. 71quater in relation to the nature of technologies which may be offered for sale etc. The effect of exempting uses for purposes such as accessing, listening to or consulting protected subject matter is to modify the meaning of technology as used in Article 6(2) EUCD. To the extent that such technologies permit access to works only, persons dealing in such technologies do not necessarily pursue the objective of facilitating circumvention, and thereby the degree of knowledge is irrelevant. Likewise, such cracking technology is not necessarily intended to circumvent within the meaning of Article 6(2) EUCD. Thereby, devices which have as their primary purpose a use or

function to circumvent in order to facilitate access will arguably be excluded from the scope of Sec. 71quater if, in the same vein, they must facilitate a circumvention resulting in a violation of exclusive rights. It then follows that the balance between technologies enabling circumvention and technologies which have a significantly other function (and which do not fall within the prohibition under Article 6(2) EUCD) is modified because devices etc. enabling access only will then arguably fall within the “significantly other use or function” leg of the test. This conclusion, necessarily, depends upon the relationship between the two sub-paragraphs, and, in particular, the question whether Article 6(2) EUCD establishes a secondary complimentary act of aiding copyright infringement or facilitating acts of circumvention, or whether the provisions must be construed so as to provide a tort in its own right. A proposition to simultaneously permit acts for purposes of enjoying the work whilst prohibiting any technology that would facilitate this appears unsound and imbalanced.

#### **IV. *Exceptions***

Section 71quinquies Copyright Act transposes Article 6 (4) EUCD though it significantly departs. The section provides that “notwithstanding the legal protection for technological measures, the right holders must take necessary measures, in particular by contract, to ensure the beneficiaries, accessing lawfully a protected work or performance, an exercise without restriction, according to conditions provided therein”, for the exceptions relating to “illustration for teaching as provided by Sections 10, 2° and 46, 9°, 2° reproduction for private use as provided by Sections 10, 4° et 46, 4°, recordings of works made by broadcasting organizations as provided by Sections 10, 9° et 46, 7°, 4° reproduction made by libraries, etc. as provided by Section 10, 10°; 5° use for the benefit of people with a disability, as provided by Section 10, 11°; 6° use for the purposes of public security or to ensure the proper performance or reporting of proceedings; as provided by Section 10, 12°, 7° database use as provided by Sections 10bis and 68. Insofar as rights holders do not take the measures provided under the first paragraph, the beneficiaries of the exceptions, a professional association or an association representing their interests are entitled to take injunction proceedings, in accordance with Section 81 of the present Act, in order to make cease the application of technological measures impeding the exercise of the exceptions. Accordingly, the act introduces, arguably, a positive right to claim the removal of TPM’s, a rather exceptional way of ensuring the continued enjoyment of limitations which decidedly shifts the balance between limitations and technological in favour of beneficiaries. According to Sec. 71quinquies, the rights can be exercised in accordance with Article 81, following which an order by the President of the District Court in Civil Matters may be granted with a view to ceasing the infringing technologies. The explanatory memorandum preserves the right to apply technological measures with respect to reproductions permitted for private purpose in order to limit the number of copies (parl. Doc. 5128, at p. 20).

Sec. 71sexies implements Article 6(4)(4) EUCD and provides that “technological measures voluntarily taken by the right holders, in accordance with paragraph 1, including those applied in implementation of voluntary agreements, and those possibly

implemented in compliance with a judicial decision are protected against circumvention in accordance with Section 71<sup>quater</sup> above”.

It should be recalled that, in relation to private copying, the act foresees the introduction of a fair compensation system. It follows that right holders applying TPM's can only be held liable under Article 81 provided such compensation is facilitated. This, in turn, will depend upon alternative means since, as noted, Luxembourg is reluctant to introduce a general levy system. Right holders will therefore have to individually negotiate contractual terms following which TPM's may be applied.

The explanatory memorandum also details that acts of circumvention for the purpose of encryption is not, as such, permitted, though the explanatory memorandum aims to preserve encryption research. How the balance between TPM's and research freedom is to be achieved is unclear at present.

#### **V. *Online Transmissions***

The provisions of paragraphs 1 and 2 of the present Section do not apply to online uses, i.e. to works or performances made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

#### **VI. *Computer Programs***

Section 71 (4) excludes the application of the Act to technological measures used in connection with computer programs. Similar provisions on technological protection specifically designed for software had been introduced in Sec. 37 Copyright Act dealing with “special measures of protection”. *Inter alia*, Sec. 37 prohibits dealings in unlawful copies of a protected computer program. Sec. 37 c) provides that any person who has knowledge or reason to believe, that it is unlawful, allows the circulation or possesses for commercial purposes any means the sole intended purpose of which is to facilitate the unauthorized elimination or disablement of possibly built-in technical devices for the protection of the computer program can be held liable. It should be noted that Sec. 37 Copyright Act is applicable only with respect to unlawful copies. One open issue in relation to computer programs concerns the limitations for decompilation etc. as implemented in accordance with the 1991 Software Directive (91/250/EC). Given that Sec. 71<sup>quater</sup> excludes the application of TPM's for computer programs above and beyond Sec. 37 Copyright Act, it follows that the general limitations in relation to software permit the circumvention and, accordingly, dealings in circumvention devices and technologies for such purpose. The provision does not to apply to acts of circumvention as such nor to services offering circumvention devices.

### **E. Rights Management Information**

Sec. 71<sup>octies</sup> Copyright Act implements verbatim Article 7 (1) of the Directive. Likewise, Article 7 (2) has been literally transposed in a new Sec. 71<sup>septies</sup>.

## **F. Sanctions**

The Act provides for both civil and criminal sanctions.

As noted, acts of circumvention are considered as constituting civil torts (Secs. 1382-1383 Civil Code). Criminal sanctions apply with regard to acts not done for strictly private purposes in cases contravening any prohibition under Sec. 71ter- 71quater (Sec. 71quater (3), referring to Article 83 Copyright Act). Under Art. 83, a fine between € 250 and € 250.000 may be imposed. The same applies with respect to acts contravening the protection of Rights Management Information, Article 71octies (3).



## XIX MALTA

The Directive was implemented into the Copyright Act of Malta (Chapter 415 of The Laws of Malta) by virtue of the coming into force of Part XVIII of Act IX of 2003 called 'An Act entitled the Various Laws (Amendment) Act' issued in the Government Gazette of Malta No. 17,467 - 2nd September, 2003.

The Directive was implemented through a drafting that was undertaken by the Attorney's General Office and the Commerce Division of the Ministry of Competitiveness and Communications of Malta which is the competent authority in Malta.

### A. Exclusive rights

The implementation of exclusive rights is effected through Sections 7 (1) (a), 7 (1) (c) and 7 (1) (e) of the Copyright Act. Changes have been made to the existing statutory text. More specifically, the right of reproduction was made broader in order to cover the storing of a work in any medium by electronic means (direct or indirect, temporary or permanent reproductions), the right to communication to the public was redefined in order to include expressly the right of making available and the right of distribution was added to the catalogue of the exclusive rights.

#### I. *Reproduction Right*

The beneficiaries of the Right of Reproduction after the implementation are authors of literary, artistic, audiovisual, musical works and databases (section 7. (1) (a)); performers of fixations of their performances (section 13. (b)); producers of sound recordings in respect of their sound recordings (section 15. (a)); producers of first fixations of audiovisual works in respect of the original and copies of their audiovisual works (section 15. (a)); broadcasting organizations in respect of fixations of their broadcast or initial cable transmissions (section 17. (1) (b)). There are no divergences with respect to the Directive.

Prior to the implementation, the law did not distinguish between temporary and ephemeral reproductions, on the one hand and permanent reproductions on the other hand. Although the term « reproduction » was defined in a broad way in Article 2 (: « *reproduction means the making of one or more copies of a work* »), the term « copy » was defined more narrowly and it was referred only to material copies (: « *copy means a reproduction in written or graphic form, in the form of recording of a cinematographic film, or in any other material form* »). The statutory text was changed and now temporary reproductions are recognised as infringement of the reproduction. According to the definition of the term « reproduction » in Article 2 of the Copyright Act, reproduction means the making of one or more copies in any material form of a work and includes storing such work in any medium by electronic means. Moreover, according to section 7 (1) (a), copyright shall be the exclusive right to authorise or prohibit the (a) direct or indirect, temporary

or permanent reproduction by any means and in any form, in a whole or in part (as these provisions were substituted by the implementing Act IX of 2003).

## **II. *Communication to the Public***

There were no provisions concerning the non - simultaneous receptions of electronic communications prior to the implementation of the Directive. There was no recognition of such acts of public interactive communication under pre-existing copyright law.

After the implementation Article 7(1) (f) provides that copyright shall be the exclusive right to authorise or prohibit the broadcasting or rebroadcasting or the communication to the public or cable retransmission. According to Article 2 (definitions), communication to the public means the transmission of a work by wire or wireless means and for purposes of Article 7 includes the making available to the public of the work in such a way that members of the public may access the work from a place and a time individually chosen by them.

## **III. *Distribution Right***

An exclusive distribution right in favour of the copyright owner was available in the previous version of the Copyright Act, in section 7(1)(c). This right is limited by the EC's doctrine of Community Exhaustion in section 8 of the Copyright Act. After the implementation, it is included in the list of exclusive rights of Section 7 of the Copyright Act. According to the definition of the distribution right in Section 2, « distribution » means the making available to the public by sale or other transfer of ownership.

The national rule of exhaustion of the distribution right is provided by section 8(1) of the Copyright Act. According to this, the first sale or other transfer of ownership in the market of the original work enjoying copyright or copies thereof, when such sale is effected by or with the consent of the copyright owner himself, shall exhaust the exclusive distribution right in respect of that work or its copy. For the purposes of this Article « market » means the market in Malta and as from the 1st May of 2004 the European Union.

There is no express reference in the Copyright Act if the exhaustion extends or does not extend to non-physical transactions. As stated above, this rule is found in section 8 of the Act. There is no definition of the way the rule on exhaustion is to apply in Malta. It therefore follows that the principles outlined by the ECJ on the manner the rule of exhaustion is to be interpreted, apply also in Malta. In this regard, the question of exhaustion does not arise in the case of services and on-line services in particular. In line with the Directive, the above also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the right holder.

Moreover, the Copyright Act does not seem to permit restrictions upon the distribution right by way of restrictive licences.

## B. Exceptions and Limitations

Some specific non-mandatory limitations have been implemented. Existing limitations have been modified in order to be in full compliance with the Directive. Such modifications or deletions are contained in Section 3 (a), (b), (c), (d) and (f) of the Copyright and Related Rights (Amendment) Law of 2004.

The three step test was implemented. According to section 9 (3) of the Copyright Act, the exceptions and limitations provided for in this Article shall only be applied in such particular cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.

There was no express reference to the three step test prior to the implementation at least not to the extent as in incorporated in the Copyright Directive. However, the principles of the three step test were already existent in the Act, specifically in the protection given to the *sui generis* right in databases since the section in the Act which regulated this *sui generis* right were derived exclusively from the Databases Directive (which includes the Berne 3-step test).

### I. *Transient Copies*

Article 5 (1) of the Directive has been implemented by Section 9 (1)(a) of the Copyright Act.

According to this, temporary acts of reproduction are exempted from the exclusive right of reproduction provided that they are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary or another lawful use of a work or other subject-matter to be made, and which have no independent economic significance.

Article 9 (1) (a) has been formulated as a copyright limitation. There are no potential problems with regard to existing limitations that had to be rectified during the implementation process.

### II. *Reprography*

There was no specific provision prior to the implementation (only the general « fair dealing » limitation covered in a general way reproductions for private use).

A limitation concerning reproductions on paper or any similar medium has been introduced to the copyright Act by the implementing Act of 2003. According to new paragraph 9 (1) (b) , copyright does not provide control over reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exceptions of sheet music, provided that the right holders receive fair compensation.

### **III. *Private Copying***

A specific provision concerning the private copying did not exist previously in the Copyright Act. It was covered by a general provision concerning various uses by way of fair dealing. (Section 7 (1) (a) of the previous Copyright Act). According to this Article, copyright shall not include the right to control the doing of any of the aforesaid acts (including reproduction in any material form) by way of fair dealing for purposes of research, private use, criticism or review etc. Private copying was not subject to a levy (i.e. fair compensation). There was no restriction to natural persons.

A specific provision concerning private copying was added due to the implementation. The previous provision was abolished. According to section 9 (1) (c) of the Copyright Act as it was amended by Act IX of 2003, copyright shall not include the right to authorise or prohibit reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to Article 42(3) and (4) to the work or subject-matter concerned. As we can see, there is an express requirement to take into application of technological measures into account.

### **IV. *Libraries, museums and archives (Article 5 (2) (c) EUCD)***

Prior to the implementation, this limitation did not exist. Now, section 9 (1) (d) of the Copyright Act provides that copyright shall not include the right to authorise or prohibit specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

### **V. *Broadcasters***

A limitation concerning reproductions of a work by or under the direction or control of a broadcasting authority existed (section 7(1)(l)) but it was modified by the implementing Act. New section 9 (1) (e) provides that copyright shall not include the right to authorise or prohibit ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts, provided that any reproduction of a work made under this paragraph may, if it is of exceptional documentary character be preserved in official archives. Consequently, it is permitted the archiving of copyrighted material by broadcasting organisations when the material is of exceptional documentary character.

### **VI. *Social Institutions***

This limitation did not exist prior to the implementation. It was implemented in Article 9 (1) (f) of the copyright Act. This limitation is subject to fair compensation, but there is no compensation scheme in place.

## **VII. *Teaching and Scientific Research***

A limitation concerning the use of works in school or universities for educational purposes has already existed (Article 7 (2) (h) of the previous copyright Act). The indication of source was not required and it was no subject to fair compensation. However, the implementing law of 2004 modified the existing provision. New section 9(1) (h) provides that copyright shall not include the right to authorise or prohibit the reproduction, translation, distribution or communication to the public of a work for the sole purpose of illustration for teaching or scientific research only to the extent justified by the non-commercial purpose to be achieved, and as long as the source, including the author's name is, unless this is impossible, indicated. The implementing provisions followed the wording of the Directive and they were a literal translation of these provisions. The limitation concerns not only reproductions and communications to the public but also translations and distributions.

There is no requirement for fair compensation.

## **VIII. *Disabled People***

This limitation did not exist in copyright law before the implementation of the Directive. It was implemented by new section 9 (1) (i) of the Copyright Act. The implementing provisions followed the wording of the Directive. According to this Article, copyright shall not include the right to authorise or prohibit the reproduction, translation, distribution or communication to the public of a work for the benefit of people with a disability which are directly related to the disability and of non-commercial nature, to the extent required by the specific disability. The limitation concerns not only reproductions and communications to the public but also translations and distributions.

## **IX. *Current economic, Political or Religious Topics***

This limitation did not exist in copyright law before the implementation of the Directive. It has been implemented by new Section 9(1) (j) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction by the press, translation, distribution or communication to the public of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name is, unless this is impossible, indicated. The limitation concerns not only reproductions and communications to the public but also translations and distributions. It followed the wording of the Directive. There is a « current events » restriction.

## **X. *Quotations***

This was partially covered by the general fair dealing provisions of section 7 (1) (a) of the Copyright Act which has been abolished. However, this provision did not refer directly to quotation. A new specific limitation was implemented in section 9 (1)(k) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction by the press, translation, distribution or communication to the public of quotations for purposes such as criticism or review, provided that they relate to the work or other subject-matter which has already been lawfully made available to the public, as long as, unless this is impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purposes. It followed the wording of the Directive. The limitation concerns not only reproductions and communications to the public but also translations and distributions.

## **XI. *Public Security***

This limitation already existed (Article 7 (o)), but it covered only uses for the purpose of a judicial proceeding or of any report of any such proceeding. It was modified due to the implementation and it became broader. It followed the wording of the Directive. According to new section 9 (1) (l) of the Copyright Act, copyright shall not include the right to authorise or prohibit the reproduction by the press, translation, distribution or communication to the public of a work for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. The limitation concerns not only reproductions and communications to the public but also translations and distributions.

## **XII. *Speeches, Public Lectures etc.***

It did not exist prior to the implementation. Now it is provided by section 9(1)(m) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction by the press, translation, distribution or communication to the public of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by informatory purposes and provided that the source, including the author's name, unless this is impossible, is indicated. The limitation concerns not only reproductions and communications to the public but also translations and distributions.

## **XIII. *Religious or Official Celebrations***

A limitation of this kind did not pre-exist and the situation. Now it is provided by new section 9(1)(n) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction by the press, translation, distribution or communication to the public of a work for use during religious celebrations or official celebrations organised by a public authority.

#### **XIV. *Architectural Works etc.***

This limitation already existed before the implementation of the Directive in two forms. Article 7 (1) ( c ) provided that shall be exempted the inclusion in a film, broadcast or rebroadcast of any artistic work situated in place where it can be viewed by the public and Article 7 (1) (d) provided that shall be exempted the reproduction and distribution of copies of any artistic work permanently situated in a place where they can be seen by the public. These provisions were replaced by new section 9(1) (p) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the inclusion in a communication to the public, the making of a graphic representation and the making of a photograph or film, of a work of architecture or sculpture or similar works made to be located permanently in public places. It covers both acts of communication to the public and acts of reproduction by means of graphic representation, photograph or film.

#### **XV. *Incidental Inclusion***

This limitation pre-existed in a relatively restricted form (section 7 (1) (e) ) and it was modified due to the implementation. It is provided in section 9 (1) (q) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the incidental inclusion of a work or other subject-matter in other material.

#### **XVI. *Advertising for Public Exhibitions etc.***

This limitation did not pre-exist. It was implemented in new section 9(1) ( r ) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction, distribution or communication to the public of a work for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use.

The limitation concerns not only reproductions and communications to the public but also distributions.

#### **XVII. *Caricature and Parody***

There was an express limitation concerning the use of a work for purposes of caricature, parody or pastiche prior to the implementation ( section 7(1) (b)) of the previous Copyright Act). Now it is provided in section 9 (1)(s). It refers expressly to both acts of reproduction and communication to the public.

#### **XVIII. *Demonstration and Repair***

This limitation did not exist before the implementation. It has been implemented in new section 9 (1) (t) of the Copyright act. According to this, copyright shall not include the right to authorise or prohibit the reproduction, distribution or communication to the public of a work in connection with the demonstration or repair of equipment. The

limitation concerns not only reproductions and communications to the public but also translations and distributions.

#### **XIX. *Artistic Works***

This limitation did not exist before the implementation. It was implemented in new section 9(1)(u) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the reproduction, distribution or communication to the public of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building. The limitation concerns not only reproductions and communications to the public but also distributions.

#### **XX. *Research or Private Study***

Article 5 (3) (n) was implemented in section 9 (1) (v) of the Copyright Act. According to this, copyright shall not include the right to authorise or prohibit the communication to the public, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph (d) of works and other subject-matter, not subject to purchase or licensing terms, which are contained in their collections.

### **C. Compensation System**

There is no levy scheme in place. Malta has introduced the required claims for fair compensation for private copying and for copying in social institutions though at present there is no administration.

### **D. Protection of Technological Measures**

The definition of technological protection measures is included in Article 2 (section « definitions »). The provisions about the circumvention of technological protection measures are implemented in section 42 (1) (c ) and (d) the copyright Act.

#### **I. *The definition of 'effective' technological measures***

The implementing law followed narrowly the definition of the Directive. The definition of technological protection measures is included in Article 2 (section « definitions »). According to this definition : « the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any neighbouring right or the sui generis rights as provided for. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective ». (implementing Article 6 par. 3 of Directive 2001/29).



## **II. *The prohibition of acts of circumvention***

The provisions about the prohibition of acts of circumvention of the Directive 2001/29/EC have been implemented without any deviations or changes. According to section 42 (1)(c) of the Copyright Act, copyright, neighbouring rights and sui generis rights are infringed by any person, who, without the license of the copyright owner or right holder does anything which circumvents any effective technological measures, which the person concerned carries out in knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

## **III. *The prohibition of acts dealing in anti circumvention devices***

According to section 42(1) (d), copyright, neighbouring rights and sui generis rights are infringed by any person who without the license of the copyright owner or right holder manufactures, imports, distributes, sells, rents, advertises for sale or rental or possesses for commercial purposes of devices, products or components which: a) are for the purpose of circumvention of, or b) have only a limited commercially significant purpose or use other than to circumvent, or c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

The provisions about the prohibition of acts dealing in anti circumvention devices of the Directive 2001/29/EC have also been implemented without any deviations or changes. The only deviation in the English text is that some words were probably omitted by mistake. More precisely, the text is « ... *which: a) are for the purpose of circumvention of* », while the text of the Directive is « ...*which: a) are promoted, advertised or marketed for the purpose of circumvention of*, ».

Moreover, according to section 42 (1)(e), copyright, neighbouring rights and sui generis rights are infringed by any person who without the license of the copyright owner or right holder provides, promotes, advertises or markets a service which serves for the purpose of circumvention of any effective technological measures.

## **IV. *Limitations and technological protection measures***

The provisions of Article 6 (4) of the Directive were implemented in section 42 (2) (a) of the Copyright Act. According to this paragraph,

(a) notwithstanding the provisions of sub-Article (1) (c), (d), and (e), where the application of any effective technological measure to a copyright work prevents any beneficiary of an exception provided for in Article 9(1) (b), (c), (e), (d), (f), (i), (l) or (h) from benefiting from that exception, the right holder shall make available to the beneficiary the means of benefiting from that exception, to the extent necessary to benefit from that exception or limitation :

Provided that the beneficiary shall have legal access to the protected work or subject-matter concerned :

Provided further that there is no voluntary measure taken by the right holder or exclusive licence or agreement between the right holder and the other party concerned, the purpose of which is to enable the beneficiary (or persons of a class to which the beneficiary belongs) to benefit from the exceptions specified in the above paragraph.

(b) The provisions of sub Article (2) (a) do not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

There is no administrative procedure to ensure the participation of beneficiaries. There are no views or proposals of beneficiaries taken during the implementation process. The limitations which are chosen correspond to the relevant list of limitations provided in Article 6 (4) of the Directive. These are the following :

- m) 9(1) (b) : reproductions on paper or any similar medium quotation for the purpose of criticism or review. It corresponds to the limitation of Article 5 (2) (a) of the Directive.
- n) 9 (1) (c) : reproductions by a natural person for private use. It corresponds to the limitation of Article 5 (2) (b) of the Directive.
- o) 9 (1) (e) : ephemeral recordings by broadcasters. It corresponds to the limitation of Article 5 (2) (d) of the Directive.
- p) 9 (1) (d) : limitations applying to specific acts of reproduction by public libraries, educational establishments or archives. It corresponds to the limitation of Article 5 (2) (c) of the Directive.
- q) 9 (1) (f),: reproductions of broadcasts made by social institutions. It corresponds to the limitation of Article 5 (2) (e) of the Directive.
- r) 9 (1) (i) : use for the benefit of people with disability. It corresponds to the limitation of Article 5 (3) (b) of the Directive.
- s) 9 (1) (h): use of a work for the purpose of illustration for teaching or scientific research. It corresponds to the limitation of Article 5 (3) (a) of the Directive.
- t) 9 (1) (l) : use of a work for the purpose of public security. It corresponds to the limitation of Article 5(3) (e) of the Directive.

All the limitations mentioned in section 42(2)(a) are included in the list of limitations of the Article 6 (4) of the Directive. In practice the entire provision found in the Copyright Directive on technological measures was copied into Maltese law. At the time of implementation of this provision into Maltese law, the legislator did not vary anything from what Article 6 of the Directive states on technological measures. In practice, therefore, a purchaser of a copy of a work which is protected by a technological measure

should be allowed to exercise the limitations under copyright law in his favour against the mentioned copy of the work. License terms and conditions should not prevail.

Though in Malta there are no specific provisions on the relationship between the provisions on technological measures and consumer rights, should license terms go against the rights a consumer has through the limitations under copyright law, the license terms could be challenged in a Court of law on either of two fronts: (1) it could be argued that the rights a consumer has at law under the Copyright Act to exercise limitations against the protected material are being hindered by the rules protecting the technological measures. This is not an easy way of challenging such license terms under the Copyright Act itself. A *sui generis* action in Court would have to be filed, if needs be. Option (2) would be to challenge the license terms by means of consumer legislation and try to argue that the license term is an unfair contractual term. This could also prove to be difficult since the provisions in our consumer legislation are not drafted specifically towards the issue of technological measures.

## **E. Rights Management Information**

The provisions of the Article 7 of the Directive were implemented without changes in Section 42 (1) (f) of the Copyright Act : « copyright, neighbouring rights and sui generis rights are infringed by any person who without the license of the copyright owner or right holder knowingly performs one of the following acts: the removal or alteration of any electronic rights - management information; the distribution, importation for distribution, broadcasting, communication of making available to the public of works or other subject-matter protected under this law from which electronic management information has been removed without authority if such person knows or has reasonable grounds to know that he by so doing is inducing, enabling, facilitating or concealing an infringement of copyright or any neighbouring right, or of the sui generis rights provided by this Act. Provided that any of these items of electronic rights-management information : (i) is associated with a copy of these items of electronic rights-management information; (ii) appears in connection with the communication to the public of a copyright work under the terms of this Act; (iii) is covered by a sui generis right under the terms of this Act».

The definition of the expression "rights management information" is provided in Article 2 of the Copyright Act (definitions). According to this, the expression "rights management information means any information provided by right holders which identifies the work or other subject-matter referred to this Act, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

There are no disparities to the Directive.

## F. Sanctions

The acts of circumvention of technological measures and acts dealing with anti-circumvention devices or acts dealing with services which serve the purpose of circumvention are expressly considered as infringing acts (section 42). However, there are no specific sanctions which have been introduced following the implementation.

The liability for the infringement of copyright, of neighbouring rights or sui generis rights is provided for in section 43(1) of the Copyright Act. The civil remedies the Copyright Act provide for are a claim for damages compensation, the restitution of all profit derived by the defendant from the infringement of copyright, additional damages in cases of flagrant infringement of copyright, and the delivery up to the plaintiff, by the defendant, of the infringing Articles still in possession of the defendant.

According to the relevant provisions, where any person infringes copyright, neighbouring rights or sui generis rights, he shall be liable, at the suit of the copyright owner or right holder to be sentenced by the Civil Court, First Hall, to payment of damages or to the payment of a fine to be determined in accordance with a scale of fines to be prescribed by the Minister, as the said Court, having regard to the circumstances of the case, may deem proper and to the restitution of all the profit derived from the infringement.

The Civil Hall, First Hall may in an action for infringement of copyright, of neighbouring rights or sui generis rights having regard to all the circumstances and in particular to the flagrancy of the infringement and any benefit accruing to the defendant by reason of the infringement, award such additional damage as the justice of the case may require.

Moreover, the Court may, in a suit instituted under this Article, on the application of the plaintiff, order that all the infringing Articles still in possession of the defendant be delivered to the plaintiff.

All these types of remedies pre-existed the implementation. No additional specific sanctions have been introduced post the implementation of the provisions of the Copyright Directive.

Criminal sanctions are provided for in the Criminal Code (Chapter 9 of The Laws of Malta), specifically Section 298B which states that: “(1) Whosoever, for gain, or by way of trade prints, manufactures, duplicates or otherwise reproduces or copies, or sells, distributes or otherwise offers for sale or distribution, any Article or other thing in violation of the rights of copyright enjoyed by any other person and protected by or under Maltese law, shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine (*multa*) not exceeding five thousand liri or to both such fine and imprisonment. (2) Proceedings under this Article may not be taken except on the complaint of the injured party.”

There are no express provisions dealing with the liability of intermediaries in the Copyright Act of Malta. This issue is not regulated by the Copyright Act but by the Electronic Commerce Act (Chapter 426 of the Laws of Malta). The basic rule is found in section 19(1) of this law which holds that where an information society service is provided, and such service consists in the transmission, in a communication network, of information provided by the recipient of the service, or the provision of access to a communication network, the provider of such a service shall not be liable, otherwise than under a interdicting injunction, for the information transmitted. In order for this rule to apply, such provider must not have itself initiated the transmission, it must not have selected the receiver of the transmission; and it must not have selected or modified the information contained in the transmission. Information society service providers are also obliged by law to promptly inform the public authorities competent in the matter of any alleged illegal activity undertaken or information provided by recipients of their service and shall grant to any such authority upon request information enabling the identification of recipients of their service with whom they have storage agreements.

## XX THE NETHERLANDS

The Directive has been implemented by the Act of 6 July 2004, which came into force on 1 September 2004.<sup>242</sup>

In the year 2000 (that is before adoption of the final text of the Directive) the Dutch Ministry of Justice initiated consultations with interested third parties. Comments and proposals could be posted to a special website operated by the Ministry.

Since the consultation process was concluded before the adoption of the final text of the Directive, and since the majority of stakeholders had had the opportunity to make their point of view known to the government, a Bill for the implementation of the Directive 2001/29/EC was introduced on 22 July 2002 before Parliament and underwent only minor amendments before it was finally adopted. The final act provides for amendments to the Copyright Act (*Auteurswet*), the Neighbouring Rights Act (*Wet op de naburige rechten*) and the Database Act (*Databankenwet*). The original proposal, subsequent amendments, and proceedings of the parliamentary debate are officially published under number 28 482.

### A. Exclusive rights

Under the Dutch Copyright Act (DCA), all exclusive rights of the author are governed by either one of two broad concepts: the right to make a reproduction, or ‘verveelvoudiging’, pursuant to Article 13 DCA and the right to communicate to the public, or ‘openbaarmaking’, pursuant to Article 12 DCA.

The right to make a reproduction (*verveelvoudigen*) encompasses two elements: the right to make copies of a work of authorship, and the right to make adaptations, arrangements, interpretations, translations, or any form of conversion of the work into another work. Actually Article 13 of the Act only refers to the second element of the right of reproduction. Because the issue was so obvious to the Dutch legislator, the first element of the right of reproduction is nowhere explicitly provided for in the Copyright Act. However, Article 14 of the DCA specifies for more certainty that ‘the reproduction of a literary, scientific or artistic work includes the fixation of the whole or part of the work on an object, which is intended to play a work or to show it’.

The right to communicate to the public generally covers all acts by which a work can be communicated, distributed or made available to the public, including the first disclosure of the work or of adaptations of the work, the distribution of copies of the work, and the acts of playing, displaying, reciting the work etc.

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<sup>242</sup> Copyright Act of 23 September 1912, *Stb.* 1912, 308, as last modified by the Act of 6 July 2004, *Stb.* 2004, 336.

According to the Dutch legislator, the concept of reproduction already included the right of reproduction described in Article 2 of the Directive; while the concept of communication to the public was broad enough to encompass both the right of communication to the public of Article 3 and the distribution right of Article 4 of the Directive. The implementation of the Directive has therefore not resulted in any modification of the provisions relating to the author's exploitation rights in the DCA.

## **I. *Reproduction Right***

All five categories of beneficiaries enumerated in Article 2 of the Directive enjoy an exclusive right of reproduction under Dutch domestic law. Until the recent legislative modifications, the right of reproduction conferred on authors of literary, scientific or artistic works (including authors of original databases) pursuant to Article 13 of the Copyright Act was broader than the right of reproduction conferred on the four categories of neighbouring rights holders.

Contrary to authors who enjoy under the DCA a broad right of reproduction (*verveelvoudigen*), which includes both the right to make copies and the right to make adaptations of a work, performers, phonogram producers, film producers and broadcasting organisations enjoyed under the Dutch Neighbouring Rights Act of 1993<sup>243</sup> only the right to make copies (*reproducen*) of 'recordings' of their performances<sup>244</sup>, 'phonograms'<sup>245</sup>, 'first fixations of films'<sup>246</sup>, or 'recordings of broadcasts',<sup>247</sup> respectively. Article 1f) of the DNRA defined 'reproduction' in very strict terms as 'the making of one or more copies of a recording or of a portion thereof'.

As a result of the implementation of the Directive, the definition of 'reproduction' in Article 1f) of the Neighbouring Rights Act has been modified to read as follows:

'reproduction' means the direct or indirect, temporary or permanent, complete or partial reproduction of a recording or a reproduction thereof by any means whatever and in any form whatever (...)'.

Arguably the words 'in any form whatever' could be interpreted in such a way as to confer on neighbouring rights holders not only the right to make copies of their subject matter, but also the right to make adaptations, arrangements, or translations of their subject matter.

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<sup>243</sup> Wet van 18 maart 1993, houdende regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen of van eerste vastleggingen van films en omroeporganisaties en wijziging van de Auteurswet 1912 [hereinafter Dutch Neighbouring Rights Act or DNRA].

<sup>244</sup> Article 2(1)(b) of the DNRA.

<sup>245</sup> Article 6(1)(a) DNRA.

<sup>246</sup> Article 7a(1)(a) DNRA.

<sup>247</sup> Article 8(1)(b) DNRA.

## **II. *Communication to the Public***

The concept of communication to the public ('openbaarmaking'), laid down in Article 12 of the DCA, which existed prior to the implementation of the Directive, was considered broad and flexible enough to encompass non-simultaneous or interactive receptions of electronic communications without any need for a legislative modification in this sense. Article 12 of the DCA has therefore remained unchanged.

In contrast, the rights conferred on performers, phonogram producers, film producers and broadcasting organizations were until the implementation of the Directive written in a very technologically dependent way. Each right holder enjoyed for example an exclusive right to broadcast, repeat broadcast, or communicate to the public their performance, phonogram, first fixation of a film or broadcast, or a recording of a performance, phonogram, first fixation of a film or broadcast, or a reproduction thereof. Articles 2(1)d, 6(1)c, 7a(1)c, and 8(1)e of the Neighbouring Rights Act have all been modified to expressly add the right to make available to the public a performance, phonogram, first fixation of a film or broadcast, or a reproduction among the exclusive rights of the rights holders.

## **III. *Distribution Right***

The concept of distribution has always been regarded as part of the right of communication to the public ('openbaarmaking') pursuant to Article 12 DCA. For this reason, the DCA did not contain a specific distribution right before the implementation of the Directive, and it still does not after implementation.

With the implementation of Article 4(2) of the Directive, the Dutch legislator introduced for the first time in the Copyright Act the principle of Community-wide exhaustion of the distribution right, namely in Article 12b. Before the implementation of the Directive, the principle of exhaustion had been recognised in case law and in copyright doctrine. Until the introduction of Article 12b in the Act, however, the distribution right was thought to be exhausted internationally, i.e. the principle of exhaustion applied as soon as a copy of a work was put on the market with the consent of the right holder anywhere in the world.

The exhaustion rule in Article 12b DCA applies only to physical copies put on the European market with the consent of the right holder. According to the Explanatory Memorandum (28 482-3, p. 37) the application of the exhaustion rule is limited to the distribution of the original and copies of the work, i.e. physical objects in which the work is embodied. Consequently, the exhaustion rule does not apply in the Netherlands with regard to digital works put on the "market" – that is the Internet - with the consent of the rights holder. Thus the distribution right is not exhausted in the case of downloaded software, music etc. fixed on a CD(-ROM); whereas it is after the first sale of a CD(-ROM) containing the same copyright material (software, music). This is in accordance with Article 4(2) of the Directive.



The application of the exhaustion rule under the DCA does not prevent the right holder from granting licenses with a geographically restricted scope of application, but of course geographical market partitioning is subject to competition law. Product market differentiation seems permissible under Dutch copyright law. In its 1979 Poortvliet-judgment,<sup>248</sup> the Dutch Supreme Court (*Hoge Raad*) held that copies of a work brought into circulation with the permission of the copyright holder, which were later modified by the owner of the copies, were not subject to the exhaustion principle where the owner penetrated a market with the modified copies that the rights owner could not have reached with the original, unmodified exemplars.

## **B. Exceptions and Limitations**

The three-step-test, as set out in Articles 9(2) of the Berne Convention and 13 of the TRIPS Agreement, has never been codified in the DCA. The situation was not changed as a result of the implementation of the Directive. As evidenced in the Explanatory Memorandum, the Dutch Government believed that Article 5(5) of the Directive did not need to be codified as it would only have led to more open-ended limitations, and thus to a loss of legal certainty. This would have contradicted the objectives pursued by the Community legislator. In the Government's view, the three-step-test creates a general framework within which the legislature must examine the exceptions to and limitations on the economic rights, and an instrument for the courts for the interpretation and practical application of a given exception/limitation. In practice, the limitations of the DCA have been examined in the light of the three-step-test, as laid down in Articles 9(2) of the Berne Convention or 13 of the TRIPS agreement, only in very few decisions rendered by the Dutch courts.<sup>249</sup>

### **I. *Transient Copies***

The Directive's regime on transient copying is new to the DCA. Prior to the implementation of the Directive, the DCA did not address temporary and ephemeral reproductions; in principle, short-lived acts of reproduction constituted an infringement of the owner's right of reproduction. However, it was also commonly accepted that the temporary reproduction of works must have a minimal element of duration to give rise to a reproduction under the Copyright Act. In other words, not all technically possible reproductions were automatically seen as copyright relevant reproductions.

In accordance with this view, Article 5(1)(a) of the Directive, according to which certain temporary acts of reproduction do not constitute an infringement of the right of reproduction, has been transposed in a new Article 13a DCA, which reads as follows:

"The reproduction of a literary, scientific, or artistic work does not include temporary reproduction of a passing or incidental nature and forming an integral and essential part of a technical process whose sole purpose is to enable the transmission in a network

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<sup>248</sup> Dutch Supreme Court, 19 January 1979, *Nederlandse Jurisprudentie*, 1979, 412.

<sup>249</sup> Dutch Supreme Court, 22 June 1990, *Nederlandse Jurisprudentie*, 1991, 268 (*Zienderogen Kunst*).

passing between third parties by an intermediary, or a lawful use, and if it has no independent economic value.”

In contrast with the structure of the Directive and with the implementation acts of most Member States, this provision has therefore not been incorporated in the section of the DCA on exceptions and limitations, but rather as a carve out from the definition of the reproduction right. This triggered a debate among Dutch copyright experts, but most academics now agree that in practice it does not really matter whether the temporary reproduction should be an exception to the reproduction right or fall outside the scope of the notion of reproduction altogether.

Furthermore it is worth noting that, in accordance with Article 5(1)(a) of the Directive, the exclusion of temporary reproductions from the reproduction right applies only if these reproductions have no independent economic value. The word ‘value’ is in line with the Dutch version of the Directive, but it does not seem to tally with other versions (compare to the English ‘significance’ or the German ‘Bedeutung’). However during the parliamentary negotiations the Dutch legislature expressly opted for the term ‘value’. It has been suggested that the term ‘value’ entails a narrower demarcation of the exclusion of temporary reproductions from the reproduction right than does the term ‘significance’.

Following the same logic, the definition of the concept ‘reproduction’ in Article 1f) of the Neighbouring Rights Act has been modified by adding a second sentence to the text, as follows: ‘reproduction does not mean the temporary reproduction of a passing or incidental nature and forming an integral and essential part of a technical procedure whose sole purpose is the passing on by an intermediary through a network between third parties or enabling a lawful use and if it contains no independent economic value.’

## **II. Reprography**

The law on reproductions by means of reprography was amended by the Act of 2002. Articles 16 h- 16 m provide for a remuneration system for the reprographic reproduction of an Article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works that are reproduced in these works. A reprographic reproduction is described as ‘reproduction techniques that lead directly to a readable copy of a writing on paper or microfiche’. Examples mentioned are copying by hand, copying by typewriter, photocopying and faxing.<sup>250</sup> It is explicitly said that saving works on a computer is not covered by this exception. This has remained unchanged since the implementation of the Directive.

According to Articles 16h- 16m of the Dutch Copyright Act of 1912, it is not an infringement of copyright to reproduce an Article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works. Such reproductions may

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<sup>250</sup> Law proposal 22.600, Explanatory Memorandum, p. 8.

only be made provided that they are limited to the number of copies which the enterprise, organization, or establishment may reasonably need and that the person who makes copies or orders the making of copies pays an equitable remuneration to the author of the work thus reproduced or his successors in title.

### III. *Private Copying*

Article 16b § 1 Copyright Act 1912 lays down the basic rules on private copying. It grants the right for everyone to reproduce a work, in a limited number of copies, for the sole purpose of private practice, study or use of the person who makes the copies or orders the copies to be made exclusively on his behalf. This means that, in principle, all means of reproduction are covered by the exception: in other words digital reproductions may also be made without the consent of the right owner. Although the Act contains no mention of this, the number of copies is limited to 2 or 3 copies according to the literature.<sup>251</sup> In Article 16b § 2, a special rule is laid down with the aim to prevent works on paper (daily or weekly newspaper, periodical, book or the score or parts of the score to a musical work) to be entirely copied.<sup>252</sup> It is stated that reproductions of these works can only be limited to a small portion of the work, with the exception of some specially described works in Article 16§ 2 sub a and b. According to Article 16 § 4, a reproduction permitted under Article 16b may not be given to third parties without the consent of the copyright owner, except in connection with judicial or administrative proceedings. 16b § 5 states that Government orders may specify that a fair payment should be made to the author or his right-holders for the reproduction specified in paragraph 1. The orders may issue more detailed rules and impose more detailed conditions.

Articles 16 c-16 g deal with the specific issue of home taping and provide for a remuneration system for reproductions of works by fixing it on an object used for the purpose of showing the images or play the sounds recorded upon it. The manufacturer or importer of the supports will be liable for payment of the remuneration. Important is that, in Article 16c, the concept of reproduction does not include transformation. This is because in the Dutch version of Article 16c the term '*reproductie*' is used, meaning reproduction in a narrow sense (see also Part I, answer to question 1a/b, last paragraph).

In accordance with the terms of the Directive, the new provision excludes legal persons from the benefit of the exception in art 16b § 1 by specifying that private copying is authorized only when done by 'natural' persons. It also introduces the condition that the copies are made exclusively for non-commercial ends. Art 16c is considerably changed and amended.

With respect to neighbouring rights, Article 10e of the DNRA was modified to provide as follows: "The following shall not be regarded as infringements of rights as defined in Articles 2, 6, 7a and 8: the reproduction of material protected under this Act, provided

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<sup>251</sup> Spoor and Verkade 1993, p. 230.

<sup>252</sup> Van Lingem 2002, p. 139 ff.

that the reproduction occurs with no direct or indirect commercial purpose and is intended exclusively for private exercise, study or use by a natural person who manufactures the reproduction; Articles 16c, paragraphs 2 to 7 inclusive, 16d to 16ga inclusive and 35c of the Copyright Act 1912 shall apply to this, *mutatis mutandis*;

To comply with the requirements of the Directive, Article 16c of the DCA has been modified to restrict its application to natural persons. As mentioned before, the new provision does not contain any express requirement to take into account the application or non-application of technological measures. However the Explanatory Memorandum speculates at some length on a future phasing out of levies, as required by Art. 5(2)(b) of the Directive. According to the Dutch Government, account must be taken not only of the actual application of technical protection measures, but also of their being available. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, levies should not become a bonus for rights holders who make no use of technical protection measures.

#### **IV. Libraries, museums and archives**

Article 5(2)(c) has been transposed by the Dutch legislature in Article 16n DCA. The provision is new to Dutch copyright law. It allows public libraries, museums and archives to make archival copies of works in their collection, subject to strict conditions. The purpose must be merely archival (not commercial), (1) with the aim of restoring the work, (2) of replacing it in case of imminent destruction or (3) of keeping it in a condition in which it can be consulted if there is no technology available to render it accessible. In contrast with Article 5(2)(c) of the Directive, the Dutch provision subjects the application of this exception to two additional conditions: first, that the specimen of the work forms part of the collection held by the library, museum or archive accessible to the public relying on this limitation; and second, that the provisions in Article 25 on moral rights be taken into account.

The same limitation has been incorporated into the Neighbouring Rights Act at Article 10f and following substantially the same wording as in the Copyright Act.

#### **V. Broadcasters**

The Dutch Copyright contained an exception for ephemeral recordings by broadcasting organizations, long before the implementation of the Directive. In fact, as a result of the implementation of Article 5(2)(d) of the Directive, the scope of existing Article 17b of the DCA was broadened, within the bounds of the Directive, of course. The main difference with the prior situation is that Article 17b of the DCA no longer specifies the permitted duration of fixations made by broadcasting organizations, which used to be 28 days. The new Article 17b(2) merely requires that fixations be 'temporary'. It is now up to the courts to decide whether or not a fixation is to be considered temporary. A second difference is that archiving is permitted for recordings containing a 'separate documentary value', but this no longer is subject to conditions of application nor

dependent on the adoption of a government ordinance. Finally, the Dutch term ‘zendorganisatie’ (transmission organisation) has been replaced by the Community term ‘omroeporganisatie’ (broadcasting organisation).

The same limitation has been incorporated into the Neighbouring Rights Act at Article 10g and following substantially the same wording as in the Copyright Act.

## **VI. *Teaching and Scientific Research***

Long before the implementation of the Directive, the Dutch Copyright Act allowed the “taking over of parts of works” for teaching purposes, pursuant to Article 16. Article 16 § 1a gave examples of possible acts falling under the scope of the exception, such as the taking over in publications and sound or visual recordings and according to § 1b radio or television program. Whether these means of reproduction included digital reproduction or online communication was highly uncertain. As a result of the implementation of the Directive, Article 16 of the DCA has been made technology-neutral/independent, so that digital reproductions also are covered as well as acts of making a work available to the public. Accordingly, all reproductions and communications that comply with the conditions set out in the Article are in principle covered. Notably, Article 16 of the DCA contains three additional criteria that do not appear in Article 5(3)(a) of the Directive:

- the work from which the part is taken must have been published lawfully;
- the adoption must be in accordance with what might reasonably be accepted under the rules of social custom;
- moral rights have to be observed;

In addition, educational use requires that the source of the work used be indicated. Furthermore, and in contrast to the Directive, educational uses have always been and remain permissible under Dutch law provided that an equitable remuneration is paid to the rights owners. It has been and still is up to the user (the institution) to timely offer to the right holder the equitable compensation; equitability is estimated in terms of what is accepted in the line of business at hand.

Before the implementation of the Directive, all institutions that provided materials made for use as illustration for teaching purposes could benefit from the teaching exception. This included commercial institutions, for instance companies that published educational books. ‘Teaching’ was to be interpreted broadly. To comply with the requirements of the Directive, Article 16 of the DCA has been modified to specify that the taking over from parts of work shall not be deemed an infringement of copyright only to the extent justified by the intended, non-commercial purposes. The meaning of non-commercial is not quite clear yet, but according to the Minister of Justice the nature of the activity of taking over the protected material is decisive. If this activity only takes place with the intention of using the material exclusively for teaching purposes, it will be covered by the exception of Article 16. Recital 42 of the Directive stresses that organization and means

of funding of the education institute is *not* decisive. Agreements between right owners themselves and between right owners and users of copyright protected material will have to determine the line between commercial and non-commercial use according to the Minister.

With respect to neighbouring rights, Article 11 of the DNRA provides essentially for the same limitation as under the Copyright Act. This Article reads as follows: ‘There will be no infringement of the rights specified in Articles 2, 6, 7a and 8 if the actions relate exclusively to use as illustrations for teaching purposes, so far as justified by the intended and non-commercial purpose; Article 16, paragraph 1, at 1<sup>o</sup>, 2<sup>o</sup>, 4<sup>o</sup> and 5<sup>o</sup> of the Copyright Act 1912 shall apply to this, *mutatis mutandis*; Article 5 must be observed in relation to a performance.’

### **VII. *Disabled People***

A new Article 15i DCA allows for reproduction and public communication of copyrighted works for the benefit of disabled people under the conditions specified in Article 5(3)(b) Directive (i.e. the use must be directly related to the handicap, of a non-commercial nature, and necessary). Paragraph 2 states that fair compensation for these uses is due. The same limitation has been incorporated into the Neighbouring Rights Act at Article 10i and following substantially the same wording as in the Copyright Act.

### **VIII. *Current economic, Political or Religious Topics***

The DCA’s limitations for the press, which relate both to public communications and to reproductions, were and are laid down in Articles 15 and 16a. Both provisions have been altered for the purpose of transposition of Article 5(3)(c) of the Directive. Article 15 on news reporting reads as follows:

‘It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if:

- 1° the adoption is made by a daily or weekly newspaper or weekly or other periodical in a radio or television program or other medium fulfilling the same purpose;
- 2° the provisions in Article 25 are observed;
- 3° the source, including the name of the author, is clearly indicated; and
- 4° copyright is not expressly reserved.

2. A reservation as specified in paragraph 1 at point 4<sup>o</sup> may not be made in relation to news reports and miscellaneous reports.

3. This Article shall also apply to adoption into a language other than the original’.

Article 15 DCA has been somewhat expanded to include media performing a function similar to the media expressly mentioned in the provision (newspapers, weeklies, magazines, radio and television programs). This amendment, which was inspired by the legislature's quest for media-neutrality, has opened up the possibility for news-oriented web sites to benefit from the exemption. Conversely, news published on the Internet may now be reused by other media, subject to the conditions of Article 15.

Article 16a exempts the making of a short recording, and the showing or announcement thereof in public in a photographic, film, radio or television report, provided that it is justified for giving a proper account of the current event that is the subject of the report and provided that the source, including the author's name, is clearly indicated as far as reasonably possible. The obligatory indication of source has been added for the purpose of implementing Article 5(3)(c) Directive.

Both limitations on news reporting have been incorporated into the Neighbouring Rights Act at Articles 10a and 10d, including a direct reference to the conditions set out in the Copyright Act.

## **IX. *Quotations***

The right to make quotations has also existed for a very long time in the Dutch Copyright Act. Before the implementation of the Directive, Article 15a of the Copyright Act 1912 stated that quotations were allowed in ‘an announcement, criticism, polemic or scientific treatise’ as long as the conditions set out in the Article were met. For many authors, the circumstances listed in the Act are the most controversial element of the provision. Such restriction on the scope of the limitation appeared strange not only in light of the neutral concept of ‘quotation’, but also in light of the social reality{ XE "European Convention on Human Rights" }. The quotation right of Article 15a has therefore been updated. A quotation is now permissible not only in “an announcement, criticism or scientific treatise”, but also in a “publication for a comparable purpose”. The scope of the quotation exception is restricted conform Article 5(3)(d) in the following ways:

- 1) the work quoted from must have been published lawfully;
- 2) the quotation is to be commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved;
- 3) as far as reasonably possible the source, including the author's name, is to be clearly indicated.

This was already stipulated as such in the DCA. The requirement that moral rights are to be observed, not prescribed by the Directive, is maintained as well. According to Article

15a(2) the term ‘quotations’ shall also include quotations in the form of press summaries from Articles appearing in a daily or weekly newspaper or other periodical.

The same limitation has been incorporated into the Neighbouring Rights Act at Article 10b and making a direct reference to the conditions set out in Article 15a of the Copyright Act.

#### **X. *Public Security***

Article 22 DCA already provided that in the interests of public security as well as the detection of criminal activity, pictures of any nature whatever may be reproduced or published by or on behalf of the judicial authorities. This Article has been maintained and extended with a paragraph 2 which literally copies Article 5(3)(e) of the Directive. Article 10k of the Neighbouring Rights Act provides that: ‘The following shall not be regarded as infringements of rights as defined in Articles 2, 6, 7a and 8: the adoption of material protected under this Act for the investigation of criminal activities, public security or to safeguard the proper progression of an administrative, parliamentary or judicial procedure or media coverage thereof.’

#### **XI. *Speeches, Public Lectures etc.***

There is no specific provision in the Copyright Act that purports to implement Article 5(3)(f) of the Directive. However, the act already contained a provision that is likely to find application in the case of the use of political speeches. Article 15b of the Copyright Act provides that ‘the further communication to the public or reproduction of a literary, scientific or artistic work communicated to the public by or on behalf of the public authorities shall not be deemed an infringement of the copyright in such a work, unless the copyright has been explicitly reserved, either in a general manner by law, decree or ordinance, or in a specific case by a notice on the work itself or at the communication to the public. Even if no such reservation has been made, the author shall retain the exclusive right to have appear, in the form of a collection, his works which have been communicated to the public by or on behalf of the public authorities’. This provision was not modified as a result of the implementation of the Directive.

#### **XII. *Religious or Official Celebrations***

The DCA’s ‘congregational singing exception’, which is highly similar to that of Article 5(3)(g) Directive, has been maintained without any alterations. Note that there is no equivalent to this limitation in the Neighbouring Rights Act.

#### **XIII. *Architectural Works etc.***

One of the few controversial changes to the Dutch Act concerns Article 18. Prior to the revision, this provision allowed for reproduction or communication to the public of works of architecture and sculptures placed on, or visible from, public roads, on



condition that the reproduced work not be the main object represented. The old Article typically applied to situations where persons were depicted in front of a statue in a public square.

The new Article 18 DCA reads as follows:

“Reproduction or publication of pictures made in order to be put on permanent display in public places, of a work such as is normally found in such places, will not be regarded as an infringement of the copyright of the author in a [drawing, painting, sculpture, work of architecture, etc]. Where incorporation into a compilation work is involved, no more than a few works by the same author may be incorporated.”

Thus, the scope of the revised Article is broader in several ways. First, the 'main representation' requirement has been abandoned. Second, it applies to all works in 'public places', provided that the work “has been made to be permanently placed in public places” and is being reproduced 'as is'. According to the Government, such works are, to a certain extent, dedicated to the public domain. Therefore, publishing postcards of a sculpture in a public park is now permitted without the right holder's authorization. Note further that “where incorporation into a compilation work is involved, no more than a few works by the same author may be incorporated.”

The provision has been criticized as being overbroad. Moreover, the notion of 'public place' appears to be ambiguous. Does it, for instance, include museums? According to the lawmaker, probably not.

Note that there is no equivalent to this limitation in the Neighbouring Rights Act.

#### **XIV. *Incidental Inclusion (Article 5 (3) (i) EUCD)***

Inspired by Article 5(3)(i) of the Directive, the Dutch legislator has introduced a special exemption allowing the incidental inclusion of a work in other material. According to the new Article 18a, for the inclusion to be allowed the included work must be “a component of minor significance in another work”. The provision has raised questions as to the meaning of the word 'incidental'. Does it also allow intentional de minimis uses, such as filming a billboard as part of a documentary shot in a public square? Judging from the parliamentary proceedings, this is probably permitted.

Article 10h of the Neighbouring Rights Act provides that: “The following shall not be regarded as infringements of rights as defined in Articles 2, 6, 7a and 8: the incidental processing of material protected under this Act as a subordinate part of other material.”

#### **XV. *Advertising for Public Exhibitions etc.***

The DCA's advertising exemption in Article 23 has been revised. It provides that unless otherwise agreed, the owner, possessor or holder of a drawn, painted, built or sculpted work or a work of applied art shall be authorized to reproduce or publish that work so

far as necessary for public exhibition or public sale of that work, all subject to the exclusion of any other commercial use.

The provision's most striking aspects when compared to Article 5(3)(j) are the explicit recognition that parties may agree otherwise and rule out the application of the limitation, and the restriction to specified types of artistic works. Advertising as such is not mentioned in Article 23 DCA. In line with Article 5(3)(j) of the Directive – but contrary to the old Article 23 DCA – the uses covered by the provision must be necessary for the public exhibition/sale.

Note that there is no equivalent to this limitation in the Neighbouring Rights Act

#### **XVI.** *Caricature and Parody*

The revised Dutch Copyright Act now also expressly permits parody. This has been a disputed issue for many years – not because parody was considered a restricted act (the Dutch are proud of their sense of humour), but because it was difficult to conceptualize a parody defence absent an express exemption. In line with Article 5(3)(k) of the Directive, the new Article 18b legalizes “caricature, parody or pastiche” on the condition that “the use is in accordance with the normal rules of social custom.”

Similarly Article 10i of the Neighbouring Rights Act provides that: “The following shall not be regarded as infringements of rights as defined in Articles 2, 6, 7a and 8: a caricature, parody or pastiche, provided that the use is in accordance with the rules of what would normally be sanctioned under the rules of social custom’.

#### **XVII.** *Demonstration and Repair*

No provision with the purport of that of Article 5(3)(l) of the Directive has been codified in the DCA or in the DNRA.

#### **XVIII.** *Artistic Works*

No provision with the purport of that of Article 5(3)(m) of the Directive has been codified in the DCA or in the DNRA.

#### **XIX.** *Research or Private Study*

Following the implementation of the Directive, a new limitation has been introduced in the DCA (Article 15h) to allow access to literary, scientific or artistic works in a public library, museum or archive, provided the works are part of the institution's collection, and provided the institution does not attempt to achieve a direct or indirect economic or commercial benefit. Access is permissible only by means of a closed network through dedicated terminals, for purposes of research or private study. The text remains close to

the wording of Article 5(3)(n) of the Directive except for the fact that this section is subject to the parties' agreement to the contrary.

The Neighbouring Right Act contains a similar provision which states that: 'The following shall not be regarded as infringements of rights as defined in Articles 2, 6, 7a and 8: the provision of access to a recording of a performance, phonogram, first print of a film or recording of a programme forming part of the collections of libraries accessible to the public, and museums or archives which are not attempting to achieve a direct or indirect economic or commercial benefit, by means of a closed network through dedicated terminals in the buildings of those institutions for individual members of the public, for purposes of research or private study, unless otherwise agreed.'

**XX.** *Uses of 'minor importance'*

No provision with the purport of that of Article 5(3)(o) has been codified in the DCA or in the DNRA.

**C. Compensation system**

'Stichting Thuiskopie' (Private Copy Foundation) collects and distributes the remunerations of Article 16 c-16 g (see above, at 'private copying'). The remuneration constitutes a levy on 'empty' carriers of sound and image (analogue and digital), paid by the manufacturer or importer. 15% of the profits intended for distribution is spend on social and cultural purposes.

One of the modifications to the private copying regime deals with the manner in which the level of remuneration and the types of supports to which it applies are determined. Until now, these two aspects of the remuneration for private copying were determined solely by the *Stichting Onderhandeligen Thuiskopievergoeding* (SONT), according to Article 16(e) of the Copyright Act 1912. Although the SONT is still the designated organization in the area, the government would be given the task to determine, by statutory instrument, the types of supports to which the remuneration would apply. The government would also be given the power to specify rules and conditions for the determination of the form and level of the 'fair compensation' due for private copying. In addition, the Proposal would abolish Article 16(e)(2) of the Dutch Copyright Act of 1912, according to which the 'running or playing time of the object in question is of particular importance in determining the level of the remuneration'. This was a welcomed suggestion, since interested circles consider that the parties, i.e. the SONT and the *Stichting de Thuiskopie*, are in the best position to know which factors should be taken into consideration in determining the level of remuneration.

The Dutch implementation Act makes no express reference to the requirement of Article 5(2) of the Copyright Directive, according to which the fair compensation due to authors and other rights holders for private copying must 'take account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'. In the Explanatory Memorandum accompanying the Proposal, the Minister of Justice declared on this point that, for the time being, the

current private copying regime should be applied to analogue and digital storage media, since the reasons initially invoked for the creation of such a regime are still valid and since there are no practical alternatives currently available.<sup>253</sup> The Minister added that it is to be expected that the technology will in the future allow the regulation of private copying activities so that there will then be little or no need for a levy system. The Minister of Justice has been given the power to determine the types of supports to which the remuneration would apply, on the belief that his involvement may ensure a better transition between a levy regime and a technical protection regime.<sup>254</sup>

According to Articles 16h- 16m of the Dutch Copyright Act of 1912, it is not an infringement of copyright to reproduce an Article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works. Such reproductions may only be made provided that they are limited to the number of copies which the enterprise, organization, or establishment may reasonably need and that the person who makes copies or orders the making of copies pays an equitable remuneration to the author of the work thus reproduced or his successors in title. The remuneration, the level of which is determined by the *Stichting Reprerecht*, is proportional to the amount of copies realised in a year. The general tariff per page reproduced applies to governmental institutions, libraries, educational institutions and other institutions active in areas of public interest as well as private enterprises. A reduction in price has been created in favour of educational institutions that are not part of an academic institution. The reason invoked for this difference in treatment is that educational institutions that do not provide academic education or that do not conduct scientific research generally reproduce works that are significantly less costly than their academic counterparts.<sup>255</sup>

## D. Protection of Technological Measures

### I. *The definition of 'effective' technological measures*

This definition has been literally copied into Article 29a(1) DCA

### II. *Acts of circumvention*

Article 29a(2) of the DCA and Article 19(1) of the DNRA state, in line with Article 6(1) of the DCA, that those who circumvent purposive technical provisions knowingly, or who should reasonably know they are doing so, shall be acting unlawfully. The prohibition is not defined as part of the exclusive right of the copyright holders, but as unlawful acts can be sanctioned under civil law. No criminal sanctions have been

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<sup>253</sup> Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, Year 2001-2002, 28 482, No. 3, p. 46.

<sup>254</sup> Hugenholtz, Guibault and van Geffen 2003, p. 28.

<sup>255</sup> Staatsblad 2002, Nr. 574, p. 1.

imposed; according to the legislator, criminal enforcement of these new norms would be wholly premature.

### **III.** *Acts dealing in anti circumvention devices*

Article 29a(3) of the DCA and Article 19(1) of the DNRA also constitute a literal codification of the provision of the Directive, Article 6(2). Here too, the act of dealing in anti-circumvention equipment or devices is considered unlawful, constituting liability under civil law.

### **IV.** *Beneficiaries of limitations and technological protection measures (Article 6 (4))*

The anti-circumvention provision of Article 29a(4) of the DCA and its counterpart in Article 19(3) of the DNRA are noteworthy only for their reluctance to directly transpose Article 6(4) of the Directive, the notoriously opaque 'facilitation' requirement. Instead, both provision delegate the power to the Government to provide for such an obligation by way of government ordinance, if right holders fail to voluntarily facilitate the exercise of copyright exemptions. The instrument of an ordinance will allow a flexible and timely response, according to the Government. Interestingly, Article 29a(4) of the DCA and Article 19(3) of the DNRA refer not only to the obligatory exceptions of Article 6(4)(1) of the Directive, but also to the optional private copying exemption mentioned in Article 6(4)(2).

### **V.** *The relationship between technological measures and limitations*

It is certain that right holders may take action against circumvention of a technological measure that prevents the performance of acts covered by a copyright exception or limitation. This is explicitly stated in the Explanatory Memorandum. Consumer rights, in particular as to private copying, did play a part in the Parliamentary discussions, but the Minister of Justice held that the DCA does not give the consumer an 'absolute right to make private copies'. Technological measures may therefore prevent private copying, without reservations. The Minister indicated however that ordinary consumer law may help the user. Pursuant to Article 7:17 of the Dutch Civil Code a product must contain those characteristics which a buyer may reasonably expect it to have.

## **E. Rights Management Information**

Article 29b of the DCA and Article 19a of the DNRA codify nearly word for word Article 7(1) and (2) of the Directive.

## **F. Sanctions**

The Dutch legislator did not introduce any new sanctions following implementation of the Directive. Enforcement is to be carried out under civil law. Among the old (civil) sanctions are the injunction (under penalty of damages imposed in case of non-compliance), claims for damages, transfer of profit, and claim and seizure of goods. These sanctions can also be found in – and thus remain applicable after implementation

of – Directive 2004/48 on the enforcement of intellectual property rights. That Directive by the way adds a number of sanctions to the Dutch system (e.g. information duties, recall). The Dutch Penal Code contains three rarely used provisions (Article 31-33) on copyright enforcement under criminal law.

### **I.** *New remedies*

The legislator has chosen to declare the Dutch civil liability regime (tort law) applicable to the acts described in Article 6 and 7 Directive. When taking action against infringements right holders may avail themselves of the sanctions discussed above. Article 28 of the DCA has been extended with a paragraph 8 which provides for the applicability of the remedies for copyright infringement (destruction or rendering unusable of goods) to acts infringing Article 29a and 29b of the DCA. There are no penalties under criminal law.

### **II.** *The position of intermediaries*

The DCA does not contain a provision on ‘contributory copyright infringement’. However, as far as the DCA does not intend to permit certain behaviour, general tort law (‘onrechtmatige daad’, i.e. the law on unlawful acts) may enable the right holder to take action against harmful acts that do not constitute (‘direct’) infringement of his exclusive rights. The making available on the Internet of file-sharing software might be unlawful under Dutch law. Important factors appear to be the extent in which the software may be used for other purposes (than copyright infringement), and the possibility of the provider to prevent infringement.<sup>256</sup> Liability of Internet service providers for copyright infringement that takes place on their servers, is governed by tort law as well. It is generally accepted in The Netherlands that Internet server providers can be liable in case they are aware of copyright infringements within their systems.

## **G. CONCLUSION**

The anti-circumvention provision of Article 29a of the DCA does not directly transpose the ‘facilitation’ requirement of Article 6(4) Directive. It merely delegates the power to the Government to provide for such an obligation by way of government ordinance if right holders fail to voluntarily permit the exercise of copyright exemptions.

Note also that Article 29b(4) of the DCA refers not only to the obligatory exceptions of Article 6(4)(1) of the Directive, but also to the optional private copying exemption mentioned in Art. 6(4)(2).

The Dutch system of exceptions and limitations has traditionally been a closed one. In its 1995 Dior/Evora decision, the Dutch Supreme Court opened the door to limit the rights holders’ exclusive right even in the absence of a directly applicable statutory limitation, provided that the restriction fits into the general legal framework, that the

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<sup>256</sup> See the Kazaa cases: Hof Amsterdam 28-3-2002, LJN AE0805; and HR 19-12-2003 LJN AN7253

moral rights are respected and that the right holder does not suffer any (additional) damage. Following this decision, the Dutch copyright community became split on the issue of the desirability of introducing a 'fair use' type defence in copyright infringement cases. The closed system of the Directive has put an end to the Supreme Court's case law and to the desire of introducing a 'fair use' type defence in the Dutch copyright system.

A conceptually (not practically) significant disparity appears to be the implementation of Article 5(1) not as an exception/limitation, but as a "carve-out" of the reproduction right.

It may further be noted that the Directive's exceptions/limitations of Art. 5(2)(e), 5(3)(f), 5(3)(l), 5(3)(m), 5(3)(o) do not have a counterpart in the DCA or the DNRA.

The limitation of Articles 16n DCA and 10f of the DNRA on preservation copies is narrower than Article 5(2)(c) Directive requires it to be. After all the Dutch provision authorizes the making of these copies only (1) with the aim of restoring the work, (2) to replace it in case of imminent destruction or (3) to maintain 'readability' of the work in case of nearly obsolete retrieval technology.

Unlike Article 5(3)(i) of the Directive, the limitation of Article 18a of the DCA on incidental uses requires the included work to be "a component of minor significance in another work".

## XXI NORWAY

The directive was implemented by an amendment to the Copyright Act, which at the same time also amended or added further provisions to the Act, not included in the directive.

The issue which completely overshadowed any other issue was related to the technical protection measures. The government introduced a privilege for the end user to circumvent the technical protection in order to make it possible to play a recording by other “relevant” equipment. In order to explain this, the bill gave the example of a compact music disk which could not be played on the car stereo; in this case, an end use might circumvent the protection. However, this privilege did not extend to the conversion of a CD format to another format, for instance a MP3-format. This example gave cause to an unusually strong reaction from both radical political youth and individuals associated with the Electronic Frontier movement. The bill was dubbed the “MP3 Act”, and the left wing Red Youth organised protest before the Ministry of Culture and Church Affairs where the participants were dressed up as iPods (notwithstanding that iPods promotes a proprietary standard different from MP3).

In the Parliament, the Committee for Cultural Affairs reported on the bill to the first chamber, the Odelsting (for legislative purposes, the Parliament splits into two chambers), where the current legislation was interpreted rather differently than in the bill itself, not only with respect to the proposed amendments, but also to existing clauses. No amendments to the wording in the amendment were proposed. The situation is most unusual, as it is difficult to categorise the opinion of the Committee according to the traditional legal sources – if an amendment had been proposed, it might be part of the legislative history, but the discussion of the provisions not under amendment, is perhaps some sort of legal literature. The report certainly will have relevance for the interpretation of the statute, but it still has to be seen what the effect is. The situation became more delicate when the spokesman for the majority of the Committee, the Member of Parliament for the Socialist Democrats, Mr Trond Giske, after the general election autumn 2005 was made Minister of Culture and Church affairs.

The most important divergence between the majority of the Parliament Committee and the bill may be with respect to copies made from works uploaded to the Internet. The Committee stated that right holders by this implied a license for utilisation of the works beyond what follows from the limitations of the exclusive rights in the Copyright Act chapter 2. This is highly relevant with respect to the extended statutory license in operation, according to which a contract between the organisations of right holders and users is extended to non-members of the organisations, making it possible to negotiate a blanket license for instance for photocopying in the educational institutions. The payment for such copying is estimated on statistics for use. In the negotiations between the right holders, represented by the collective society for reproduction, *Kopinor*, and the



owners of the primary and secondary schools, the Union of Municipalities (*Kommunenes sentralforbund*) autumn 2005 an agreement was not reached, partly due to differences in how to take into account copies from the Internet. On the failure to reach an agreement, Kopinor called a stop to all photocopying in the schools. This only was lifted when the statutory dispute settlement procedure was brought into play, which still has not reached a decision (May 2006).

The directive was implemented formally by an amendment to the Copyright Act of May 12, 1961.<sup>257</sup> The amending act was 2005:97 “Lov om endringer i åndsverkloven m.m.” (“Act on amendments in the Copyright Act etc”). The act was published in Lovtidend (the official legal gazette) June 17, 2005 page 481 ff. The act entered into force by a decision of the King in Council 1 July 2005.

According to the Norwegian tradition, the amendments are consolidated with the existing (already consolidated) act, and all references are made to the resulting consolidation. The consolidation is not “official”, but the result of the editorial work of the Compilation of Statutes in Force, a bi-annual publication of all statutes in consolidated form. In practice, the consolidation is made at the time of publication by the Lovdata foundation, operating the national legal information service, and also publishing the official gazette on contract with the Office of the Prime Minister.

## **A. Exclusive rights**

Minor and mainly editorial amendments were made to Copyright Act sect 2 (economic exclusive rights). Also, the community exhaustion doctrine was implemented by an amendment of Copyright Act sect 19.

### **I. *Reproduction Right***

For copyright holders, the beneficiaries are any and all (the technical term “opphavsmann” is used for a copyright holder), cf Copyright Act sect 2.

A performing artist has the reproduction right for his or her performance, Copyright Act sect 42.

The producer of a database or a catalogue has a reproduction right according to Copyright Act sect 43.

A photographer, also when the photograph does not qualify as a copyrighted work, has an exclusive reproduction right according to Copyright Act sect 43a.

The producers of a sound recording or a movie have an exclusive reproduction right according to Copyright Act sect 45.

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<sup>257</sup> Norwegian acts are identified by two ways. Until 1970, the date and a serial number within the date, as for the Copyright Act. After 1970 continuous serial numbers for each year were adopted

A broadcaster has the right to the recording of the transmission, cf Copyright Act 45a.

The qualification of temporary reproductions (as caching in the CPU of a work station) as “copies” according to the Copyright Act has been contested in Norwegian law. It was still undecided by case law when the current amendment clarified the issue in favour of the solution in the directive.

An “ephemeral copy” is a term used for the copies traditionally made by broadcasters to time-shift transmissions. This is a rather antiquated view, but Copyright Act sect 31 permits Norsk rikskringkasting<sup>258</sup> and other licensed broadcasters<sup>259</sup> to make ephemeral copies by their own equipment and for the use in their own transmissions. It follows from this that ephemeral reproductions are qualified as copies (on the basis of this understanding of the term, which is the only reproductions referred to as “ephemeral” in the literature).

## **II. *Communication to the Public***

Acts of public interactive communication were already recognised under existing copyright law. Making a work available through a computerised system was considered an example of making the work available to the public. There has not been any doubt with respect to this at any time.

## **III. *Distribution Right***

A specific distribution right already existed before the implementation. The Copyright Act specified (and specifies) three ways of making the work available to the public, the first of these is the distribution of copies among the public (cf Copyright Act sect 2(3)(a). Rights in the copy was exhausted after first sale, cf sect 19.

If a copy is sold with the consent of the copyright holder, the distribution right is exhausted. This also applies to copies of published works, and to copies of photographic copies or copies of fine art sold by the copyright holder. The exhaustion is limited to the European Economic Space with the exception of copies acquired by a physical person for private use, or if the distribution takes the form of lending or renting.

The distribution right is not considered applicable to “non-physical transactions”, though they may be functionally similar to, or indeed alternatives to, the sale of physical copies, the exhaustion doctrine is not deemed to apply. This is an interpretation of the Copyright Act, but it is not at all controversial. However, one should not exclude that

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<sup>258</sup> The national broadcaster, the old incumbent broadcaster currently organized as a limited company with the Minister of Culture and Church Affairs as its general assembly.

<sup>259</sup> Norwegian broadcasters need to have a license both for the use of the radio frequencies and making their transmissions available to the public, including both wireless transmissions and transmissions by wire (cable networks). There is an uncertain delimitation to Internet services.

the functional view may prevail in other legal contexts, for instance with respect to choice of law and international sales.

The right to distribution may be restricted by valid contractual arrangements between the parties. There are really no limits to what restrictions may be contractually agreed, but there may be an issue with respect to whether violation of such contractual terms will represent an infringement of copyright, or only a breach of contract.

## **B. Exceptions and Limitations**

The specific, non-mandatory limitations have been implemented. Not all have corresponding provisions in the Copyright Act chapter 2, where all limitations have been collected. For instance, the limitation of caricature will flow from interpretation rather than from any specific provision.

The provision for private use has been modified in several ways, including a right of right holders to remuneration from the state. The right to consult works by terminals on site in a library has been mentioned above, and was added to the Copyright Act by the amendment. It is believed that there is little friction with respect to the directive in this respect.

One should note, perhaps, that a number of the clauses on extended statutory licensing have been amended at the same time, also extending such clauses to “electronic copying”. This is not, however, an implementation of the directive, but the government pursuing its own objectives.

The three-step test has not been implemented in the text of the Copyright Act. This does not imply that it is not in effect. In the bill,<sup>260</sup> this is commented on the basis of a suggestion by one of the organisations involved in the hearing: The Ministry does of course agree that Norway through the inclusion of the directive in the European Economic Space agreement is bound by the frame for limitations of the exclusive rights set out in the three-step test. In implementing directives in Norwegian law, it will be sufficient that the provisions of what public authorities may not do with respect to private parties is express through the absence of legislation. The three-step test does not give any rights to users as such, but oblige the member countries to not restrict the exclusive rights beyond the frame of this test. The Ministry does not, on this basis, see any reason to codify the three-step test as expressed in the directive art 5(5).

### **I. *Transient Copies***

The limitation of transient copying has been implemented as a new provision, Copyright Act sect 11a. It is close to a translation of the text of the directive, though items (a) and (b) have a reversed order. It is made explicit that the provision does not apply to computer programs or databases.

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<sup>260</sup> Ot.prp.nr.46 (2004-2005). *Om lov om endringer i åndsverkeloven m.m.* Sect 3.4.1.2

## **II. *Reprography***

There has been a limitation of the exclusive right to reproduction on paper in sect 12 prior to the implementation. There are several qualifications on this exception, the major being the interpretation of the reproduction to be for “private purposes”, in which also the number of copies will be relevant. The provision has been changed, and a right to remuneration has been introduced, this is to be allocated from the state budget and subject to further regulation, not yet issued. There is a tradition for such remuneration made to a fund which is governed by the right holders, and shared between the organisations of right holders for use to their benefit, also for non-members and non-citizens.

One should be aware of the limitation for reproduction in educational institutions (Copyright Act sect 13b), public and private institutions, organisations and businesses (Copyright Act sect 14) and archive, libraries and museums (Copyright Act sect 16a) and to the benefit of disabled persons (Copyright Act sect 17) based on extensive statutory licenses.

## **III. *Private Copying***

A limitation for private copying has been a traditional limitation of the exclusive right of reproduction in Norwegian law. There was no levy on such copying, though there existed for some years after 1978 a levy on blank tapes. In considering this issue, one should be aware of the system of extended statutory licenses in effect (and broadened by the amendment) for photocopying and electronic copying for educational institutions and other institution. This is an alternative to a levy, and the organisations of right holders gain considerable remuneration through the contracts concluded on the basis of these arrangements. They fall, however, outside the scope of this question.

The limitation (one is careful not to qualify this as an “exception” as traditionally the access of public to protected works through the limitations is considered to have as strong a basis in legal policy as the exclusive rights) is implemented in Copyright Act sect 12.

The main provision (sect 12(1)) states that when not for commercial purposes, copies (the wording implies that they cannot be many) of a published work may be reproduced for private use. There is a rather voluminous literature on the interpretation of “private use”. The provision add that the right holders shall have an equitable remuneration through annual allocation over the state budget, and authorises more detailed regulation to be issued (such regulations have yet not been adopted).

Copyright Act sect 12(2) excludes number of cases, like copying of buildings, computerised copies of computer programs or databases, and reproduction of certain types of fine art when the result may be mistaken for an original.

Copyright Act sect 12(3) excludes a number of cases if the reproduction requires assistance by a third party, and includes musical works, cinematographic works, sculpture, textiles, artworks *etc.*, and artistic reproduction of works of Article

Copyright Act sect 12(4) allows people with a disability to resort to the assistance of a third party if this party does not engage in this activity for commercial reasons (*i.e.* does not offer such assistance to disabled persons as a business) for musical and cinematographic works when this is necessary due to the disablement.

Copyright Act sect 12(5) prohibits reproduction on the basis of an unlawful copy, *i.e.* which has been reproduced as an infringement of the exclusive right or through a circumvention of technical protection measures, unless this is necessary with reference to the special circumstances set out in sect 53a(3)(2). This is perhaps not an amendment of the law, but one has been reluctant to require that the person making a private copy should be liable if the basis for the reproduction was unlawful. Obviously, it may be difficult to ascertain whether a page reproduced from a book is lawful (for instance based on the extended statutory license) or unlawful. Therefore, the bill indicates that one should be careful not to apply the provision to persons who have made the reproduction in good faith with respect to the lawfulness. The change in legal policy is obviously a response to the unlawful file-sharing practices on the Internet and similar examples.

There was and are no restrictions for the reproduction on paper for natural persons apart from the interpretation of “private use”. There is, as indicated above, several further qualification of this right. The amendment introduces the explicit requirement that the basis of the reproduction has to be lawful. If the basis has been obtained by circumvention of technological measures, it is not considered to be lawful, and the limitation does not apply.

#### **IV.** *Libraries, museums and archives*

There was in force a limitation favouring libraries for conserving or securing their collections, excluding commercial use. This is retained, cf Copyright Act sect 16. There has been introduced an extended statutory license in favour of archives, libraries and museums, cf Copyright Act sect 16a. The more specific qualification of this limitation will depend on the contractual arrangements with the right holder’s organisation, and no such contract has so far been concluded.

#### **V.** *Broadcasters*

There is a limitation of ephemeral copies in Copyright Act sect 31 (see above), which is retained without amendments. This corresponds closely to the Directive art 5(2)(d). It is contested to what degree this limitation authorises archiving for a period exceeding that necessary for the broadcast. In practise, such material is archived, and the doubt on

whether this is covered by the act has been limited to marginal notes in legal literature. Obviously, there may be argued that there also is a contractual basis for such archives.

It may be of interest that an extended statutory license has been adopted by which a broadcaster may use published works in its own broadcast, or for interactive services, cf Copyright Act 32. This only applies to works published before January 1, 1997 – which implies that it in practice benefits Norsk rikskringkasting. It will make it possible to produced interactive services on be basis of the huge archives of this institution, dating back to the late 1920s.

## **VI. *Social Institutions***

Copyright Act sect 15 permits health care institutions, homes for the elderly, prisons and similar institutions to make recordings of broadcasts for use within a short period. There is given authority to further specify which institutions, and under which conditions recordings may be made in regulations.

One should note the general scheme of extended statutory licenses which benefit any public or private institution (also a social institution not enumerated here) on the basis of a contract with the organisations of the right holder.

There are in general limitations in favour of disabled persons (Copyright code sect 17 and 17a, the latter being a statutory license for the production of phonograms based on books).

And there are provisions benefiting educational institutions, partly for reproduction by the institution itself on the basis of an extended statutory license (Copyright Code sect 13b), and partly for the publishing of text books compiling published works (Copyright Code sect 18).

## **VII. *Teaching and Scientific Research***

Published works of fine art and photographs may be included with the text in a critical or scientific discussion, cf Copyright Code sect 23(1), this only applies to reproduction.

The limitation is extended for photographic works only to texts of a general educational purpose, but is subject to remuneration. The remuneration may in principle be negotiated in the case in question, but will in practise flow from arrangements with a collective society. If agreement is not reached, there is also a dispute resolution mechanism in the statute, cf Copyright Code sect 23(2).

The limitation does not apply to machine readable form, excepting non-commercial use after Copyright Code sect 23(1).

Photographs of persons may be included in works of a biographical nature, cf Copyright Code sect 23(3).

In all cases, the source has to be identified “according to good practise”.

### **VIII.***Disabled People*

These limitations have already been mentioned above. Copyright Code sect 17 limits the reproduction right in favour of disabled persons with respect to literary or scientific works or musical works, and for copies in other form than sound recordings. This is for the benefit of persons who are blind or have weak sight, or otherwise cannot enjoy the work in the usual way due to a disability. It includes reproduction on film with or without sound for those with impaired hearing or ability to speak. Commercial use is excluded, as well as the reproduction of copies produced by a third party for the purposes mentioned.

Copyright Code sect 17a has a statutory license. The King<sup>261</sup> may specify organisations or libraries that are given license to reproduce a published literary or scientific work through sound recordings or other recordings (which would include a machine readable copy) for free (*gratis*) use by the disabled. Also, published works of art or photographic works may be included associated to the text.

The provision does not apply to commercial use. The right holder should be given remuneration, which is negotiated according to the principles within the area,<sup>262</sup> and may be subject to a dispute resolution.

### **IX.** *Current economic, Political or Religious Topics*

Copyright Code sect 23a limits the exclusive right allowing newspapers, journals or broadcasters to reproduce or include images of published works of fine art and photographs when addressing a current news item, excluding such works which have been created for inclusion in these media. The right holder has a right to remuneration excepting situations in which the news item concerns the work itself.

Such works may also be included if the work only is part of the background or otherwise less important in the context. The beneficiaries are here a somewhat larger circle, including newspapers, journals, books, film, or broadcasts. The source must be cited according to good practice, cf Copyright Code sect 11.

According to the Copyright Code sect 25, if performance or display of a work is part of a current news event, brief passages of the work, or the whole work if it is small, may be included in films or broadcasts. If it only is part of the background, the whole work may be included.

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<sup>261</sup> By this is meant the King in Council, in practice the government.

<sup>262</sup> It has not been deemed necessary to mention the public policy permitting organisations of right holders to negotiate for public use of copyrighted material also when the statute limits their rights, and there therefore are no exclusive rights to enforce. This system is thought to be particular to Norway.

There is no remuneration. As always, the source has to be cited according to good practice, cf sect 11.

#### **X. *Quotations***

There is a general limitation for “quotations” in Copyright Code sect 22, a published work can be cited according to the standards of “good practice” and to the extent required by the objective. This is quite general, and includes any form of works and any type of citation – but there are more special provisions which will apply within their scope. The relation between the general and the more specific limitations may be somewhat uncertain.

There is no right of remuneration, but the source must be cited according to good practice, cf Copyright Code sect 11.

#### **XI. *Public Security***

There are no provisions in the Copyright Code for public security as such.

However, the proceedings of public councils, boards *etc*, meetings of elected public authorities, cases before the court and open meetings to discuss general issues, may be made available to the public without the consent of the right holder – who retains an exclusive right to publish compilations of his or her own contributions in such situations, cf Copyright Code sect 26.

The Copyright Code sect 27 include a general rule giving priority to access under the legislation on freedom of information and the public administration procedure act, or other statutes (which would include access to your own file under the data protection legislation). Also, a work may be used for the investigations or search by the police or as evidence before the courts.

For the instances set out in Copyright Code sect 26 and 27, *subsequent* use of the material is governed by the general provisions. For instance, one may gain access to a report under the freedom of information legislation, and a copy may be produced to enable access. But the person gaining this copy, may only further use the report (if it is subject to copyright) according to the provisions in the Copyright Code. However, one may quote from such material according to good practice, and to the extent necessary to discuss the proceedings or case in which the document is relevant, also if the document has not been published, cf Copyright Code sect 28.

#### **XII. *Speeches, Public Lectures etc.***

See above, a political speech as such is not subject to special provisions, but if part of the proceedings of a meeting or institution indicated by Copyright Code sect 26, anyone may make it available to the public.



### **XIII.** *Religious or Official Celebrations*

There is a statutory license for the publication of compilations of literary works from a larger number of authors for religious services, cf Copyright Code sect 18 (which is one of the alternatives in the provision, the other being educational purposes). The work must have been published more than five years ago, and the right holder has a right for remuneration.

A published work may also be performed during religious services, cf Copyright Code sect 21. This does not apply to cinematographic works, the performance of a stage work or database (which is rather difficult to imagine during a religious service, but there it is) or broadcast.

### **XIV.** *Architectural Works etc.*

The Copyright Code sect 24(3) states simply “Images of buildings may freely be reproduced.” The same applied to a work of fine art (like a sculpture) or photographic art which is permanently displayed at or near a public space or road, unless the work clearly is the main motif of the reproduction, which is exploited commercially, Copyright Code sect 24(2).

### **XV.** *Incidental Inclusion*

A work may be included in a broadcast or a film as part of a current news event, cf Copyright Code sect 25. If the performance or display of the work only is part of the background, or has a similarly secondary function, the work as a whole may be included.

### **XVI.** *Advertising for Public Exhibitions etc.*

The image of a work of fine art or a photographic work included in a collection, or displayed or offered for sale, may be reproduced in a catalogue or a communication relating to the exhibition or sale. The catalogue may only be reproduced by print, photocopying *etc*, excluding for instance a web page, cf Copyright Code sect 24.

### **XVII.** *Caricature and Parody*

There is no explicit statutory provision permitting caricature *etc* in the Copyright Act. However, this is clearly recognised in the doctrine as a non-statutory limitation of the exclusive rights. It is difficult to make more than a general indication, there is no prominent precedent in case law.

### **XVIII. *Demonstration and Repair***

There is no explicit provisions governing this situation, but a functional object may be modified for technical reasons, or with respect to the function, without the consent of the right holder, cf Copyright Act sect 29.

### **XIX. *Artistic Works***

A building may be modified for technical reasons, or with respect to the function, without the consent of the right holder, cf Copyright Act sect 29.

### **XX. *Research or Private Study***

The Copyright Code sect 16(2) authorises the King to give further regulations for archives, libraries, museums or educational institutions to make the works of their own collections available on site for individual persons for research or private study. This is not limited in the statutory provisions to dedicated terminals, but the regulations have not yet been issued.

### **XXI. *Uses of ‘minor importance’***

As far as can be ascertained, the above covers all instances of limitations under the Copyright Act

## **C. Protection of Technological Measures**

The provisions have been implemented in three sections.

Copyright Code sect 53a sets out the general prohibition for circumventing technical protection measures.

Copyright Code sect 53b sets out the right to use a work when technical protection measures have been implemented.

Copyright Code sect 53c imposes a general prohibition on the trafficking in devices for circumventing technical protection measures.

### **I. *Definition of ‘effective’ technological measures***

The Copyright Code sect 53a does not define “effective” technological measures, but only uses the same phrase. The bill discusses the meaning of this qualification briefly:<sup>263</sup>

“The requirement that the system should be effective implies that it has to function according to its purpose. It is no requirement that the protection system contributes

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<sup>263</sup> Ändsverkloven m.m. Ot.prp.nr.46 (2004-2005), comments to sect 53a.

to an effective realisation of the purpose in practise, though the protection should to some extent contribute towards the realisation of the purpose to protect. According to the view of the ministry, a system which may be neutralised by for instance the stroke of a felt pen on the disk itself or by pressing a key when reading, does not meet the requirement to effectiveness according to this provision. Also systems damaging the users' player cannot be said to function according to its purpose, and is therefore not included in the protection by this provision."

## **II.** *Acts of circumvention*

Copyright Code sect 53a(2) does not indicate the acts apart from the term "circumvents" (cf Copyright Code sect 53a(1).

However, Copyright Code sect 53a(3) exclude the application of the provision for restrictions in cryptology research. Also the circumvention by private uses to acquire a lawfully purchased work on what in general is considered relevant equipment. The latter qualification has been subject to considerable discussion.

## **III.** *Acts dealing in anti circumvention devices*

The Copyright Code in Sec. 53a(2) indicates that

- a) Sale, rental or other forms of distribution
- b) Production or import for the distribution to the general public
- c) Advertisement for sale or rental,
- d) Possession for commercial purposes, or
- e) Offering services related to

instruments, products or components offered with the purpose to circumvent effective technical protection system, and which only has a limited commercial use for other purposes, or which mainly has been developed to facilitate or simplify such circumvention.

## **IV.** *Beneficiaries of limitations (Article 6 (4))*

According to Copyright Code sect 53b, the right holder should see to it that a beneficiary of a set of specified provisions have may use the work without being impeded by the technical protection measurements, including reproduction. The provisions are:

- Sect 13a (reproduction for a public exam)
- Sect 15 (recordings in health care institutions, homes for the elderly, prisons *etc*)

- Sect 17 (reproduction to disabled persons)
- Sect 17a (production of phono-, videograms and computerised versions for disabled persons)
- Sect 21 (performance at a religious service or as part of education)
- Sect 26 (access to public proceedings *etc*)
- Sect 27 (access according to the freedom of information legislation *etc*)
- Sect 28 (limited secondary use of material obtained under sect 26 or 27)
- Sect 31 (ephemeral reproduction by broadcasters)

If the right holder after having been asked by the user to make the work available fail to comply, the right holder may be ordered to make available information or furnish other services necessary to make use of the work according to the purpose. Such requests are addressed to a tribunal to be established by the Ministry for Culture and Church Affairs according to regulations issued by the King (and which has not been issued so far). This tribunal may permit the user to circumvent technical protection measures if the right holder fails to comply within a deadline set by the tribunal.

Also, all material provided for legal deposit, should be furnished with sufficient information to make circumvention and reproduction of lawful copies possible.

This does not apply to works made available on individual request at a time and a way that the individual may choose time and place for accessing the work (interactive services).

The king is authorised to issue regulation which require specified institutions with the library sector to routinely be given sufficient information to circumvent technical protection measures and make lawful reproduction possible.

As indicated above, a purchaser of a copy subject to technical protection measures may circumvent this if (1) the purchaser is a private person, and (2) the circumvention is necessary to enjoy the work by “relevant” equipment. The legal history briefly summarised in the introduction, would be an argument that this would make it acceptable to circumvent technical protection measures of a compact disk to rip the content and convert the format to a MP3 player.

There are no explicit provisions for consumer protection and technological protection measures. Currently, both the Consumer Ombudsman and the Consumer Council (both public agencies) have started investigations into Apple’s iPod-system for this purpose.

The provisions of Copyright Code sect 53b does not apply to interactive purchases. It would seem that in this case, the contractual clauses will be upheld in such a way that a breach (for instance circumvention of technical protection measures) not only would be a breach of contract, but a copyright infringement. Legal literature is still analysing the consequences of the selected drafting of the provision.

## **D. Rights Management Information**

Copyright Code sect 53d prohibits the removal or amendment of electronic management information integrated in a protected work, which either is part of a copy, or appears when the work is made available to the public.

There also is a prohibition for import to distribute, trade or otherwise make available to the public a work in which the copyright management information has been removed or amended.

## **E. Sanctions**

Sanctions are organised in rather comprehensive provisions a dedicated chapter of the Copyright Code. These are adjusted by making reference to the provisions to which infringement will be sanctioned.

The technical protection provisions have been inserted as a chapter 6a. According to Copyright Code sect 54b(1)(b) this may be punished with prison to maximum three years for deliberately<sup>264</sup> or negligent breaking the provisions. Co-operation is also punishable, as well as attempts. Damages may be claimed according to the general, mainly non-statutory rules of compensation, cf the reference in Copyright Code sect 55. This is generally limited to economic loss, but there is given a special provision to claim non-economic loss for breaking the provisions of the Copyright Code. This will rarely be applied to breaking the provisions on technical protection. The general provisions on seizure, Copyright Code sect 56 will also apply.

No new types of remedies for either copyright infringement or acts infringing Article 6 and 7 been introduced. Amendments have only been made to refer to the new provisions in order to apply the existing sanctions, see above.

The Directive on eCommerce has been implemented. Otherwise the provisions of Copyright Code sect 55 apply, which specifies that the criminal liability is extended to co-operation. An intermediary may easily be qualified as co-operating with the person infringing the protection, contributing towards the crime.

For civil liability (damages), the question is similar – if the intermediary is qualified as contribution towards the damages with the conditions (negligence, causality, and economic loss) fulfilled, there will be an issue of contributory damages.

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<sup>264</sup> "Forsettlig", the translation is not adequate, there is a certain legal theory associated to the term.

## **G. CONCLUSION**

In general, the implementation is faithful to the Directive.

The amendment introduces regional exhaustion in Norwegian law. The government has been reluctant to adopt this, and was favouring universal exhaustion. We understand that this was an issue discussed at length within the government, contributing towards delaying the implementation.

The implementation of the Articles of the Directive on technical protection remains controversial. Internally, the critics argue that the provisions represent a too strict regime, unfairly favouring the right holders. It may be argued that the provisions are not implemented as strictly as required. It is foreseen that this is an area of further developments in legal policy.

## XXII POLAND

The Directive was implemented by Act of 1 April 2004 on the alteration of the Law on Copyright and Neighbouring Rights (2004 Act) and, to some extent, by the Act of 28 October 2002 on the alteration of the Law on Copyright and Neighbouring Rights (2002 Act).

No public consultation or thorough impact assessment had been undertaken before the acts were introduced. In the course of the parliamentary procedure only the internal body of the Parliament - Office of Studies and Expertise – was consulted. It delivered a very brief opinion finding the legislative proposal congruent with the Directive.

### A. Exclusive rights

#### I. *Reproduction Right*

The exclusive right of reproduction was accepted already in the very first version of the Law on Copyright and Neighbouring Rights (hereinafter: Law), as a reception of Article 9 of the Berne Convention for the Protection of Literary and Artistic Works. Its current wording was introduced by the 2002 Act, but did not alter the basic concept in any remarkable way. In Article 50.1 of the Law reproduction (equally to ‘fixation’) is defined as ‘creating, by a specific technique, work copies, including printing technique, reprographic, magnetic recording and digital technique’ and forms a separate ‘field of exploitation’. According to Article 17 of the Law authors, in each of the ‘fields of exploitation’, are vested with ‘the exclusive right to use and to exploit the work (...) and to receive remuneration for use of the work’ (unless otherwise provided by a legislative act).

Reproduction right pertains to the following neighbouring rights holders: performing artists (‘reproduction, by a specific technique, including magnetic recording and digital technique’ – Article 86 § 1.2.a), phonogram and videogram producers (‘reproduction, by a specific technique’ – Article 94 § 4.1), radio and television organisations (‘reproduction, by a specific technique’ – Article 97.2).

The range of the reproduction right in the Polish Law on Copyright matches the one set by Article 2 of the Directive, as the notion of a ‘videogram’ (any sequence of moving pictures – Article 94 § 2 of the Law on Copyright) corresponds to the notion of a ‘film’ envisaged in Article 2.d of the Directive.

The most influential part of the legal doctrine does not find short-lived acts of reproduction to be an infringement of the reproduction right<sup>265</sup>. The rationing of such a position refers to the need for equal legal standing of such a situation and other customary acts of becoming acquainted with copyright protected works (e.g. skimming a

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<sup>265</sup> See in particular J. Barta, R. Markiewicz, *Internet a Prawo*, TAIWPN Universitatis 1998, p. 138-141.

book in a book-store or watching/listening to small parts of another kind of work where it is displayed or played).

The statutory text has not been changed in that regard, so the wording of the Law still does not explicitly decide whether an ephemeral reproduction is equal to ‘creating copies of a work’.

The issue does not seem to be of a significant importance, however, as, according to the predominant line in the literature, even if short-lived acts of reproduction are covered by the right to reproduction, the author’s monopoly, due to economic considerations, should be limited by the allowed private use clause (Article 23 § 1, first sentence of the Law; see *infra*) or a concept of an implicit consent of the entitled body to introduce the work into the net<sup>266</sup>.

Is there any express statutory provision in your country dealing with the works in electronic form (i.e. has a purchaser of a work in electronic form a general right to use the work? Are there any provision with regard to third party purchasers?)

There are two provisions referring the ‘digital technique’ as a means of reproduction (Article 50.1 and Article 86 § 1.2.a of the Law) – see *supra*.

## II. *Communication to the Public*

The list of ‘exploitation fields’ is not exhaustive and therefore there were no legal obstacles for recognising non-simultaneous reception of electronic communications as one of the fields (as long as it was of a separate economic significance), regardless the fact that such a field was not explicitly provided by the Law. The legal doctrine proposed to treat non-simultaneous reception of electronic communications as one, two stage activity: “placing a work in the net in a way enabling downloading it by the user and the process of delivering it on demand”<sup>267</sup>, perceived as one of ‘electronic communication to the public’ manifestations<sup>268</sup>. After the 2002 amendments the Law has treated ‘making a work publicly available in such a way that everyone can have an access to it in a chosen place and time’ – Article 50.3 of the Law – as a different field of exploitation and therefore has explicitly followed the line previously advocated by the legal doctrine.

## III. *Distribution Right*

Since the 2002 Act, distribution of works on physical carriers has been named: ‘circulating the original or copies on which the work was recorded’ and has included acts of introduction of a work into circulation (selling)<sup>269</sup>, lending or renting – Article 50.2 of the Law. Before the 2002 Act, introduction into circulation, renting and leasing (the last

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<sup>266</sup> See J. Barta et.al., *Prawo autorskie i prawa pokrewne. Komentarz*, Zakamycze 2005, p. 425-426.

<sup>267</sup> J. Barta et.al., *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ABC 2001, p. 367.

<sup>268</sup> *Id.*

<sup>269</sup> Article 6.6 of the Law defines the introduction of a work into circulation as ‘making its original or copies available by transferring their property by the entitled person or with his/her consent’.



one had been heavily criticized and replaced by the lending right in the 2002 Act) had formed separate fields of exploitation.

According to the explicit wording of Article 51 § 3 of the Law on Copyright (as settled by the Act of 2002) the exhaustion rule applies to the distribution right and, more specifically, to introducing an original or a copy (which requires a physical carrier in each instance) into circulation, as renting or lending does not ensue exhaustion of the right. Worth mentioning is also the fact that the Polish concept of exhaustion is related to the introduction into circulation in any of the EEA countries.

Parties to a license (or a contract transferring copyrights) are free to set terms and conditions of their contractual relations (taking, of course, into consideration the obligations established by other acts, the ones on fair competition in the first instance). The only restriction envisaged in the Law requires that a license explicitly enumerates the fields of exploitation that it covers (Article 41 § 2 of the Law). No obstacles, however, prevent the parties from specific or restrictive terms of use within particular fields (like the distribution one).

## **B. Exceptions and Limitations**

In Polish Copyright Law, a test similar to the three step test (although only two step) test had existed since the Law was enacted in 1994. It is an extrapolation of the Article 9.2 of the Bern Convention to all the instances of a lawful use. According to Article 35 of the Law, such a use ‘may not infringe upon normal use of a work or justified interests of the author’. It may be assumed that also the third tier of the Directive test (certain special cases) exists (implicitly) in the Law regarding the lawful use, due to their definite list.

### **I. *Transient Copies***

Article 5 (1) has been literally implemented by Article 23<sup>1</sup> of the Law (introduced by the Act of 2004), as a copyright limitation. Article 23<sup>1</sup> states: ‘transient or incidental reproduction of works, which has no independent economic significance, forms an integral and essential part of a technological process and whose sole purpose is to enable: (a) transmission in a network between third parties by an intermediary, or (b) a lawful use does not require an author’s consent.

### **II. *Reprography***

Private copying as such is not regulated by the Law. As one of the private use dimensions, it is governed by Article 23 of the Law, which provides that, as a general rule: ‘an already disseminated work may be used for personal use without asking the permission of the author and without paying remuneration...’ (§ 1). Personal use covers single copies<sup>270</sup> of a work used by ‘a circle of persons remaining in personal relationships, in particular through kinship, family relation, or social relationship’ (§ 2).

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<sup>270</sup> Reference only to single copies was inserted by the 2004 Act.

Fair compensation in the case of reproduction is provided by a system of levies. First, they are imposed on producers and importers of reproduction equipment and carriers, calculated as a percentage of their price (up to 3 %) - Article 20 of the Law. The details of the system are regulated by the Regulation of the Minister of Culture of 2 June 2003 defining categories of equipment and carriers used for recording works and levies from selling them by producers and importers<sup>271</sup>. The implementation process did not influence the abovementioned provisions. Second, with the Act of 2002 the levies system embrace possessors of reprographic equipment, who vocationally reproduce works for personal use of third parties (up to 3 % of the income accrued from reproducing works), unless reproduction is undertaken on the basis of a contract with the entitled party (Article 20<sup>1</sup> of the Law). The system is elaborated in the Regulation of the Minister of Culture of 27 June 2003 on levies paid by reprographic equipment possessors<sup>272</sup>.

In the case of paper reproductions, information and documentation centres may make single, short copies of copyright protected published works' fragments (Article 30 § 1 of the Law). The requirement of fair compensation (Article 5.2.a of the Directive) is perceived as entitling a copyright holder to receive remuneration (directly or through the relevant collecting society), if copies are made available for payment – Article 30 § 2 of the Law. Contrary to the Directive, no exception for sheet music is established in the Polish Copyright Law.

### III. *Private Copying*

See the discussion on Article 23, 20 and 20<sup>1</sup> (*supra*). The levies system is envisaged for the fair compensation purpose. There is no express link between the private use limitation and technological measures.

### IV. *Libraries, museums and archives*

As to the information and documentation centres see *supra*. Moreover, pursuant to Article 27 of the Law (after the 2004 Act) scientific and educational institutions may, for didactical or their own research purposes, use disseminated works in original and in translation and prepare for this purpose copies of fragments of a disseminated<sup>273</sup> work.

Furthermore, on the basis of Article 28.2 of the Law (after the 2004 amendment) libraries, archives and schools may prepare or commission preparation of copies of

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<sup>271</sup> Rozporządzenie Ministra Kultury z dnia 2 czerwca 2003 r. w sprawie określenia kategorii urządzeń i nośników służących do utrwalania utworów oraz opłat od tych urządzeń i nośników z tytułu ich sprzedaży przez producentów i importerów

<sup>272</sup> Rozporządzenie Ministra Kultury z dnia 27 czerwca 2003 r. w sprawie opłat uiszczanych przez posiadaczy urządzeń reprograficznych

<sup>273</sup> An earlier version of the provision referred to a narrower notion of publishing instead of dissemination.

disseminated works for the purpose of completion, maintaining or preservation of their collections, and for making them available free of charge<sup>274</sup>.

Even though the first instance – Article 27 of the Law – does not clearly require non-commercial use, that purpose may be ‘determined by that activity as such’ in accordance with Recital 42 EUCD.

## V. *Broadcasters*

According to Article 22 § 1 of the Law, radio and television organisations may, by their own means and for their own broadcasting purposes, fix works for the purpose of their lawful use. The current wording, shaped by the 2004 Act, is more limited in comparison with the previous text in one respect – the requirement of own means of the broadcaster concerned had not been envisaged before (revision of which is a clear adjustment to Article 5.2.d of the Directive). On the other hand, the broader ‘lawful use’ requirement replaced the earlier ‘express, previous consent’.

The fixation, pursuant to Article 22 § 2 of the Law, should be destroyed within a month from the day when the entitlement expires. The time limitation does not, however, apply to fixations made in course of preparing broadcaster’s own programmes (the provision was inserted by the 2002 amendment) and programmes of an exceptional documentary nature, if placed in archives. Contrary to Article 5.2.d of the Directive, placing fixations in archives is therefore extended to the fixations ‘made in course of preparing broadcaster’s own programmes’. The requirement of notifying the author immediately of placing a fixation of his/her work in the archives was cancelled by the 2004 Act.

## VI. *Social Institutions*

This is partially covered under Articles 27 and 28, see *supra*. No other social institutions (e.g. hospitals, prisons) limitations exist.

The general rule (Article 34 of the Law, last sentence) provides that an author is not entitled to remuneration when lawful use limitations apply, unless otherwise specified by the Law. No such a provision is in place in relation to reproductions made pursuant to Article 27 or 28 of the Law, so no remuneration can be claimed.

## VII. *Teaching and Scientific Research*

Article 29 § 2 and § 2<sup>1</sup> of the Law states that it is allowed to include disseminated minor works or excerpts from larger works in textbooks, classroom selections and, after the 2004 Act, in anthologies. The right is limited, however, to didactical and research purposes and, according to Article 29.3 of the Act, remuneration should be paid.

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<sup>274</sup> Before the amendment, the right had been related only to single works unavailable on the market. The current wording therefore significantly extends the scope of the relevant provision.

According to Article 34 of the Law, source (when it is possible) must be indicated in the instance of every lawful use exception. This provision covers also illustration for teaching or scientific research. There is no explicit link between a non-commercial character of the use and educational/research purposes, but it can be drawn implicitly.

### **VIII.** *Disabled People*

Article 33<sup>1</sup> was introduced by the 2004 Act, as a copy of the relevant provision of the Directive. It allows the use of already disseminated works for good of disabled people, if the use refers directly to the disability, is non-commercial and undertaken in a dimension appropriate for the disability nature.

### **IX.** *Current economic, Political or Religious Topics*

On the basis of Article 25 § 1 of the Law press, radio and television may disseminate (in original and translation) the following works (but only for informational purposes):

1. already disseminated (i) reports on current events, (ii) current articles on political, economic or religious issues, unless it has been explicitly stated that their further dissemination is forbidden, (iii) current reporting statements and photographs,
2. brief excerpts from the reports and articles referred to in the first two points above,
3. reviews of publications and disseminated works,
4. speeches delivered at public meetings and hearings; this does not authorize publication of collections of speeches by a single individual,
5. brief summaries of disseminated works.

Remuneration for the use of a work should be paid only to authors of works referred to in point 1(ii) and 1(iii).

According to Article 23 § 4, introduced by the 2004 Act, the abovementioned rules should be appropriately used to acts of making works publicly available in such a manner that everyone can have an access to them in the place and time he/she chooses. Unless the remuneration (when due) is paid on the basis of a contract with the entitled person, the relevant collecting society should mediate.

In addition to the abovementioned situations, a more general Article 26 of the Law allows citing, in reports of current events, works<sup>275</sup> made available during these events, but within the limits justified by the informational purposes. No remuneration is envisaged in this case.

The general rule on source indication (Article 34 of the Law) applies.

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<sup>275</sup> Before the 2004 Act only excerpts, not the whole works, could be cited.

The provision can be deemed congruent with the relevant provision of the Directive.

#### **X. *Quotations***

Article 29 § 1 of the Law allows to cite, in works constituting an independent whole, excerpts from disseminated works or minor works in their entirety<sup>276</sup>, to the extent justified by explanation, critical analysis, instruction, or requirements of a specific type of art form.

Source (when it is possible) must be indicated due to the more general obligation set in Article 34 of the Law (see *supra*).

The provision fulfils requirements set in the Directive.

#### **XI. *Public Security***

Article 33<sup>2</sup> was introduced by the 2004 Act. It allows the use of works for the public security purpose, for the needs of administrative, judicial or legislative procedures or reporting them, which is a mirror picture of the relevant provision of the Directive.

#### **XII. *Speeches, Public Lectures etc.***

This is partially covered under Articles 25 and 26 of the Law (see *supra*).

#### **XIII. *Religious or Official Celebrations***

Musical and literary-musical works in the case of occasional non-profit performances may be used. The 2004 Act restricted the right to religious worship, school, academic and official state celebrations, maintaining the non-profit purpose requirement and added a new one – that artists do not receive payment – Article 31 of the Law. Advertising, promotional, and election-related events have been excluded from the scope of the exception already before the 2004 Act – *id*.

Extending the relevant right to official celebrations not organized by a public authority (e.g. schools, academia) the legislator transcended the meaning of Article 5 (3) (g) of the Directive.

#### **XIV. *Architectural Works etc.***

Works permanently displayed on public roads, streets and squares or in gardens may be disseminated, but not for the same use (Article 33.1 of the Law). The right is broader than its Community counterpart (covers not only works made for the purpose described

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<sup>276</sup> By the judgment of 23 November 2004 (I CK 232/04, OSNC 2005/11/195), the Supreme Court explained that the minority requirement refers to the proportion of the creative contribution of the citing work, in comparison to the one being cited.

in the article) and narrower (the use restriction). The provision was not influenced by the implementation acts.

**XV. *Advertising for Public Exhibitions etc.***

A separate provision in that regard (Article 33<sup>3</sup>) was introduced to the Law by the 2004 Act. It allows the use of already disseminated works for the purposes of public exhibitions or sale of works, as far as it is justified by the promotion of the exhibition or sale. Any other commercial use is excluded. Such a wording clearly follows the Community pattern.

**XVI. *Caricature and Parody***

Parodies and caricatures are covered by the abovementioned Article 29 § 1 of the Law, in the part referring to quotations justified by a specific type of an art form. Implementation acts have not influenced the rule, which nevertheless fulfils the Community requirements.

**XVII. *Demonstration and Repair***

A brief Article 33<sup>4</sup> was introduced in that respect ('it is allowed to use works in connection with demonstration or repair of equipment') to the Law by the 2004 Act. It literally follows the wording of the Directive.

**XVIII. *Artistic Works***

The 2004 Act introduced Article 33<sup>5</sup> of the Law, which allows the use of a work in the form of a building, drawing, plan or other fixation, for purposes of reconstruction or reparation of a building. As 'reparation' has a very similar meaning to 'reconstruction', it may be deemed that the provision is in line with the Community counterpart

**XIX. *Research or Private Study***

On the basis of Article 28.1 and 28.3 of the Law (after the 2004 amendment) libraries, archives and schools may (1) make available without charge, within the scope of their statutory purposes, copies of disseminated<sup>277</sup> works, (3)<sup>278</sup> make their collections available for research or study purposes, using endings of an information system (terminals) placed at premises of the entities.

**XX. *Uses of 'minor importance'***

According to Article 24 § 1 of the Law works of another radio or television station, which are broadcast via collective antenna and cable network or satellite/ground network, may be disseminated with the aid of a community antenna and a cable network,

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<sup>277</sup> Id.

<sup>278</sup> This is a new provision.

provided it is done as a simultaneous, integral, and free dissemination of radio and TV programs, and is designed for a specified audience located within a single building or in single family houses encompassing up to 50 households. Article 24 § 2 provides that owners of radio and television programme receivers may use them to receive broadcast works, even if the receivers are located within a publicly accessible area, if this is not connected for receipt of economic benefits. The copyright limitations envisaged in those provisions are interpreted narrowly by the courts.

Another use of minor importance refers to encyclopaedias and atlases (Article 33.3 of the Law). It allows disseminating published works of fine arts and photographic works in the two categories of publications, if contacting the author for the purpose of obtaining his/her permission meets obstacles difficult to overcome. The creator is then entitled to remuneration.

The limitations existed under the national law before the implementation process, but, contrary to Article 5.3.o of the Directive, they do not concern only analogue uses.

### **C. Compensation system**

A scheme is in place for private copying, see *supra*.

### **D. Protection of Technological Measures**

#### *I. Definition of Technological Protection Measures*

Definitions from Article 6 (3) of the Directive were (not perfectly) transposed to the Law by the 2004 Act, as its Article 6.10 and 6.11. According to Article 6.10, ‘technological protection measure’ means any technology, devices or their elements, designed to prevent or restrict acts enabling unlawful use of works or artistic performances’. The range of the provision, referring only to one of the neighbouring rights, is clearly narrower than the scope of the Community definition of ‘technological measures’.

Technological measures are deemed ‘effective’ (Article 6.11 of the Law) when they enable the right holders to control the protected work or artistic performance through application of an access code or protection process, such as encryption, scrambling, or any other transformation of the work or artistic performance, or a copy control mechanism, which achieve the protection objective. The effectiveness requirements follow the Community definition, save the range of technical measures themselves (see above).

#### *II. The prohibition of acts of circumvention*

Acts of circumvention are prohibited under civil law: in the case of removing or circumventing technical protection measures against access, reproduction or dissemination (but only if such activities are aimed at unlawful use of the protected work) a copyright or neighbouring right holder is entitled to invoke a basic claim

envisaged by the Law for protection of his/her economic rights (Article 79 § 3 of the Law). The claim is regulated in Article 79 § 1 of the Law, which deals only with copyright matters, but its provisions are extrapolated to the complete list of neighbouring rights - artistic performances, phonograms, videograms, broadcasts, first editions, scientific and critique editions, Article 101 of the Law<sup>279</sup>.

Article 79 § 1 of the Law asserts that ‘an author<sup>280</sup> may demand that the infringer of his/her economic rights discontinue the infringement and return the profits made, or pay the double, and in the event the infringement was intentional, triple the amount of the suitable compensation as of the time the suit was filed; if the infringer’s actions are intentional, the creator may also demand that compensation for the harm sustained be paid.’ The right-holder can not, however, invoke, in the situation discussed, Article 79 § 2 of the Law: ‘irrespective of the claims referred to in Paragraph 1, the right holder may also demand that the perpetrator of an infringement committed while engaging in a commercial activity on behalf of another person or in one’s own (even on somebody else’s account) pay appropriate amount of compensation to the Fund for the Promotion of Creativity. That amount may not be less than double the probable profits gained by the infringer from the infringement.’

Additionally, a holder of a copyright to software may claim that a software user destroys technical means (including software) in his/her possession, the only purpose of which is to facilitate an unlawful removal or a circumvention of the software technical protection measure (Article 77<sup>1</sup> of the Law). The provision had been added before the directive was decided.

The term “technological protection measures” in Article 6 of the law has a different meaning than the same term used in Article 79 of the Law. The latter refers to all neighbouring rights (except the sui-generis right in databases, which, enclosed in a different act, is excluded from the scope of the Law), while the first one only applies to artistic performances (save, of course, copyright protected works). Apparently Article 6.10 and 6.11 on the one hand, and Article 79 § 3 on the other are not adjusted to each other. Moreover, Article 79 § 3 (introduced before the Directive was enacted) does not face the wording of Article 6 (1) of the Directive (which does not refer to lawful use limitations), nor its Article 6 (4) (which does not allow such a general exception clause). Furthermore, it is not compatible with a related penal provision of the Law.

### **III. *Prohibition of acts dealing in circumvention devices***

A very broad penal provision is relevant in that regard (Article 118<sup>1</sup> of the Law): producing devices or their components intended for a prohibited removal or

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<sup>279</sup> Obviously a separate claim related to technical protection measures can be reasonably submitted as long as no further economic rights are infringed.

<sup>280</sup> Or primary economic rights holder or their legal ancestors (Supreme Court judgment of 8.12.1967, II CR 353/67)



circumvention of the technical protection measure against playing, copying<sup>281</sup> or reproducing works or subjects to the neighbouring rights, or circulating such devices or their components, or advertising them for the purpose of a sale or renting - is punishable with the penalty of fine, limitation of liberty, or deprivation of liberty up to 3 years (§ 1). The one who possesses, stores or uses the devices or their components is punishable with the penalty of fine, limitation of liberty or deprivation of liberty up to 1 year (§ 2).

Reference to ‘devices or their components intended for the prohibited removal or circumvention’ in Article 118<sup>1</sup> § 1 is much vaguer and broader than Article 6.2 of the Directive. Particularly, the intention element and lack of acknowledging ‘effective technological measures’ does not follow the Community pattern. The provision is also not really comprehensible<sup>282</sup>. Moreover, Article 118<sup>1</sup> § 2 is clearly discordant with Article 6 (2) and 6 (4) of the Directive, as it prohibits also the acts undertaken for private non-commercial purposes. All in all, circumvention acts allowed in the civil law terms (see *supra*) are forbidden by the penal provision, which shall insert a sweeping effect on the practical feasibility of the allowed use in the digital environment.

#### IV. Beneficiaries of limitations (Article 6 (4))

No legal provision in that regard exists, but the government is working on a draft of the relevant amendment. It shall even broaden the circumvention prohibition, but, on the other hand, the proposal is to oblige producers or importers to remove the protection measures in case a lawful user requires so. The draft is heavily criticised by both parties (industry/users) mainly due to evidential and organisational restraints.

### E. RIGHTS MANAGEMENT INFORMATION

Article 6.12 of the Law (introduced by the 2004 Act) establishes a definition of "rights-management information": ‘information identifying the work, author, subject of the copyright or information about the terms and conditions of exploiting the work, if they were enclosed to a copy of the work or transmitted in connection to its dissemination, including any identifying codes’. The provision, contrary to Article 7.2 of the Directive, does not state that it is the right-holder who is to provide the information, but the difference is minor. The blatant one refers to the neighbouring and sui-generis rights lacking in the definition of a ‘rights-management information’.

According to Article 79 § 4 of the Law, in the case of any rights-management information (which may refer to all the neighbouring rights, as Article 101 of the Law is extended to the issue) is removed or changed without authority, or a work is consciously disseminated with unlawfully removed or modified information, civil law remedies, equal to the ones available when circumvention of technological protection measure (Article 79 § 1 of the Law – see *supra*) are available. The implementation procedure did not

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<sup>281</sup> This action should, in fact, be covered by the one referring to reproduction.

<sup>282</sup> The plural form used for describing ‘devices or components’ is deemed to exclude the use of a single ‘device’ or its single ‘component’ (e.g. software) from the scope of the provision.

influence the provision, which makes it discordant with Article 7.1 of the Directive in three respects: the Law (1) does not require that the removal or alteration is done knowingly, (2) does not refer to the ‘inducing, enabling, facilitating or concealing an infringement’ element and (3) does not cover the database sui-generis right.

## F. Sanctions

The implementation did not significantly change the system of sanctions.

The relevant provision – Article 80 § 1 of the Law – provides that the court with jurisdiction over an action for infringement of economic rights, located in the territory where the infringing party conducts business activities or where the infringing party’s assets are located, shall rule, even before the proceedings commence, but not later than three days from the time the complaint is filed, on the interested party’s motion:

1) to secure evidence, without the necessity of proof that obtaining it later may become infeasible or too difficult (which may be conditioned on submission of appropriate security – Article 80 § 2) and

2) to oblige the infringer of the economic rights to provide the information and documentary evidence, requested by the court, relevant to the claims referred to in Article 79 § 1 of the Law.

According to Article 80 § 5 of the Law, an appeal from the court’s ruling in these matters shall be considered by the court within seven days (the practice, however, very often does not respect the requirement).

Another provision - on possibility of temporary injunction to secure claims for the infringement of economic rights (previous Article 80 § 1.3 of the Law) - was deleted by the 2004 Act. Since this change, general civil procedure norms for this kind of injunctions apply.

As a general rule related to ‘seizure of infringing material as well as of devices, products or components referred to in Article 6(2)’ – Article 8.2 of the Directive – the court shall (obligatorily) order forfeiture, for the State Treasury, of illegally manufactured copies of works (Article 80 § 3 of the Law). The court may (non-obligatorily) order forfeiture for the State Treasury, of devices which are used in illegal production of copies of works or devices which are used in the infringement (Article 80 § 4 of the Law)<sup>283</sup>. In the case of the non-obligatory forfeiture, the court may award the relevant devices to the injured party as a part of the damages award (Article 80 § 5 of the Law). Article 77<sup>1</sup> of the Law is another legal basis for a seizure action (see *supra*).

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<sup>283</sup> It is presumed that the objects referred to in Paragraph 4 belong to the infringer – Article 80 § 6 of the Law.

## **G. Conclusion**

Even though the 2004 Act clearly narrowed the reproduction right within the private use limitation to single copies, concerns whether the system of levies may be regarded as a fair compensation and when a set of copies is 'single' still are raised (which is of particular importance in the peer-to-peer environment).

There also exist some disparities as to the implementation of Article 6 EUCD, in particular as regards the required intention and the meaning of effective technological protection measures.

## XXIII PORTUGAL

Portugal implemented the Directive by amending the authors' rights law (No. 108/IX). The bill on modifications to the Author's Right and Connected Rights Code, in order to implement the Directive (Law No. 50/2004), passed on 1<sup>st</sup> July 2004. By now Law No. 50/2004 has now been incorporated into the Author's Right and Connected Rights Code<sup>284</sup>. The implementation process had been delayed due to the change of government and was only initiated in 2002. The transposition followed a public consultation process and the final implementation was preceded by three draft versions. The Author's Right Office (Gabinete de Direito de Autor, a public institution attached to the Ministry of Culture) provided the final draft which was put before parliament on 7<sup>th</sup> January 2004. An accompanying memorandum was published (Gabinete do Direito de Autor, Nota justificativa)<sup>285</sup>.

### A. Exclusive rights

The Portuguese Copyright Act contains all three required economic rights. Minor amendments had been made, specifically with the introduction of the European exhaustion principle.

#### I. *Reproduction Right*

Article 2 EUCD was implemented by Articles 68(2)(i), 176(7), 178(c), 184(1) and 187(1)(c) of Law No.50/2004--covering the reproduction right of authors, performers, phonogram and videogram producers, and broadcasting organisations.

#### II. *Communication to the Public*

Article 3 EUCD was implemented by Articles 68(2)(j), 178(a) and (d), 184(2) and 187(1)(d) Copyright Act. the provision covers the right of communication to the public, including the making available, of authors, performers phonogram and videogram producers, and broadcasting organizations.

#### III. *Distribution Right*

Authors were already granted a distribution right, Art.68(2)(f) of the Authors' Right and Connected Rights Law, the only aspect of Art.4 of the InfoSoc Directive which has to be implemented into national law is that relating to community exhaustion (Art.68(5) of Law No.50/2004).

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<sup>284</sup> Text in Portuguese available under

[http://portal.unesco.org/culture/admin/file\\_download.php/pt\\_copyright\\_2004\\_pt.pdf?URL\\_ID=30273&filename=11418343013pt\\_copyright\\_2004\\_pt.pdf&filetype=application%2Fpdf&filesize=259859&name=pt\\_copyright\\_2004\\_pt.pdf&location=user-S/](http://portal.unesco.org/culture/admin/file_download.php/pt_copyright_2004_pt.pdf?URL_ID=30273&filename=11418343013pt_copyright_2004_pt.pdf&filetype=application%2Fpdf&filesize=259859&name=pt_copyright_2004_pt.pdf&location=user-S/)

<sup>285</sup> Available from <http://www.gda.pt/>

## B. Exceptions and Limitations

The Portuguese implementation has made generous use of the non-mandatory limitations and exceptions.

The three step test (Article 5 (5) EUCD) has been implanted. The provision asserts that exceptions and limitations may not conflict with a normal exploitation of the work or other subject matter and may not unreasonably prejudice the legitimate interests of the right holder. The act does not mention that this applies only in certain special cases.

The Portuguese copyright law contains a provision on contractual restrictions conflicting with existing exceptions and limitations, Art.75(5) Copyright Act, according to which a contractual clause is deemed void which seeks to eliminate or impede the normal exercise of the free uses mentioned above.

According to Article 189 (2) Copyright Act, all exceptions and limitations likewise apply to neighbouring rights.

### I. *Transient Copies,*

Article 5 (1) on transient copying was implemented by Art.75(1) of Law No.50/2004. The Portuguese Act goes beyond the scope of the Directive. The provisions extends to "acts which enable network navigation and *temporary* storage of information, as well as acts which enable the efficient working of transmission systems, provided intermediaries do not change the contents of transmitted information and do not interfere with legitimate usage of technology judged according to good market practice, to obtain data regarding the use of information and, in general, technological processes of transmitting information". It is noteworthy that the provision mentions temporary storage (rather than transient), which indicates that the act of storing works in a computer memory will be covered. In addition, the provision is intended to deal with intermediaries' liability in accordance with the Electronic Commerce Directive, and thereby additionally serves so as to limit liability for intermediaries in all cases of temporary storage. This deviates from Article 5 (1) EUCD in that intermediaries are not merely exempt from liability for acts of transient copying but also for acts of hosting and caching infringing material.

### II. *Reprography*

Article 5(2)(a) EUCD was implemented by Art.75(2)(a) Copyright Act. The provision permits the reproduction of a work, for private purposes, on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, is allowed, without the authorization of the author. Authors and publishers have a claim to fair compensation, Article 76(1)(b) Copyright Act.

### III. *Private Copying*

The private copying exception had not been implemented since Article 81 Copyright Act

already permits the reproduction of works for exclusive private purposes, provided they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The works thus reproduced may not be communicated to the public or used for commercial purposes.

Article 82 (2) of Law No.50/2004, in which the calculation of a fair compensation takes into account the application or non-application of technological protection measures to the work or subject matter concerned.

The provision is problematic in relation to file sharing technologies. It applies regardless of whether the reproduction is facilitated by analogue or digital means and is not subject to the status of the original copy as legal or illegal. The private copying privilege is balanced by extending the existing levy scheme to digital carriers (three per cent before VAT).

#### **IV. *Libraries, museums and archives***

Article 5 (2) (c) EUCD has been implemented in Article 75 (2) Copyright Act, according to which specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage are permitted.

Fair compensation of authors and publishers is guaranteed under Art.76(1)(b) Copyright Act.

#### **V. *Broadcasters***

The exception on ephemeral recordings made by broadcasters has not been implemented. However, Article 189 (1) (d) Copyright Act permits, in more general terms, the making of ephemeral fixations by broadcasting organisations.

#### **VI. *Social Institutions***

Article 75(2)(p) Copyright Act implements Art.5(2)(e) EUCD and establishes an exception with respect to reproductions of broadcasts made by social institutions pursuing non commercial purposes, such as hospitals or prisons.

Right holders' compensation is guaranteed by Art.76(1)(d) of Law No.50/2004. Although termed as a new exception, this has been an established practice.

#### **VII. *Teaching and Scientific Research***

The exception relating to use for the sole purpose of illustration for teaching or scientific research was transposed in Article 75(2)(f) and (h) Copyright Act. There is no requirement that the source, including the author's name, be indicated.

### **VIII.** *Disabled People*

Article 75(2)(i) Copyright Act permits the use for the benefit of people with a disability, which is directly related to the disability and of a non commercial nature, to the extent justifies by the specific disability.

### **IX.** *Current economic, Political or Religious Topics*

Article 75(2)(m) Copyright Act implements Art.5(3)(c) of the Directive. It permits the reproduction by the press, communication to the public or making available of published Articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved. There is no requirement that the source, including the author's name, be indicated.

### **X.** *Quotations*

Article 75(2)(g) Copyright Act allows quotations to support one's own ideas or for purposes of criticism, discussion or teaching, to the extent required by the specific purpose, implementing Art.5(3)(d) EUCD. The purpose is qualified in that the making of quotations must support the own ideas and views of the user. There is, again, no requirement that the source, including the author's name, be indicated

### **XI.** *Public Security*

Article 5 (3) (e) was transposed into Article 75 (2) (n) Copyright Act. The exception relates to the use for purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. In relation to databases, the same limitation applies according to Article 10 (1) (c) of the Decree law 122/2000.

### **XII.** *Speeches, Public Lectures etc.*

Speeches, public lectures or similar works or subject matter may be reproduced and made available to the public by the media, Article 75 (2) (g) Copyright Act. once more, the requirement that the source, including the author's name, be indicated is missing.

### **XIII.** *Religious or Official Celebrations*

Article 75 (2) (j) Copyright Act provides exceptions for religious hymns in religious celebrations or national anthems in official celebrations. The exception is narrower than the Directive as it applies only with respect to works of a religious nature. Beside this for official celebrations only officially accepted songs and hymns like the national anthem are covered.

**XIV.** *Architectural Works etc.*

Article 75 (2) (g) Copyright Act covers the use of works such as architecture and sculpture located permanently in public spaces.

**XV.** *Incidental Inclusion*

Incidental inclusion of a work or other subject matter in other material is permitted according to Article Art.75(2)(r) Copyright Act.

**XVI.** *Advertising for Public Exhibitions etc.*

Article 75(2)(l) implements Art.5(3)(j) EUCD. The provision permits uses for the purpose of advertising a public exhibition or sale of an artistic work, to the extent necessary to promote the event, excluding any other commercial use.

**XVII.** *Caricature and Parody*

Article 5 (3) (k) EUCD on caricature and parody has not been implemented. A right to parody works is considered a free use in general as a use merely inspired by an existing work, Article 2 (1) (n) Copyright Act.

**XVIII.** *Demonstration and Repair*

Article 75(2)(s) Copyright Act allows the use of a work in relation to demonstration or repair of equipment. The exception existed previously.

**XIX.** *Artistic Works*

Article 75(2)(t) Copyright Act allows the use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building. The exception already existed.

**XX.** *Research or Private Study*

Article 5 (3) (n) was implemented in Article 75 (2)(o) Copyright Act. The provision covers the communication or making available of works and other subject matter not subject to purchase or licensing terms, which are contained in existing collections, to individual members of the public for the purpose of research or private study. Works must be made available on dedicated terminals on the premises of libraries, museums, archives or educational establishments.

**C. Compensation System**

The Act provides both for a levy scheme which is applicable to the exceptions of reprography, private copying, use in libraries, museums and archives and broadcasts made by social institutions. Article 82 establishes a levy scheme under which the fair compensation claims provided for specific acts of reproduction, authors, owners of



neighbouring rights and publishers receive compensation are administered. The levy is collected as a tax included in the sale price before VAT. It is imposed upon all devices which allow the storage and reproduction of works and includes, as noted, digital carriers, for which the tariff had been set at three per cent of the net sales price. In addition, the levy applies to all other appliances and devices which enable the making of copies by any technology. The tariffs are established by way of decree. No levy is due for devices and carriers which are solely acquired by audiovisual enterprises or phonogram and videogram producers for production purposes.

## **D. Protection of Technological Measures**

The transposing instrument has added a new Title VI to the Authors' Right and Connected Rights Code, entitled "Protection of Technological Measures and of Rights Management Information", which implements Articles 6 and 7 EUCD.

The Act implements the protection of technological measures in Article 217 Copyright Act, which is immediately succeeded by a provision establishing criminal liability for both acts of circumvention and preparatory acts (Articles 218 – 219 Copyright Act). Article 6 (4) EUCD has been implemented in Article 221 Copyright Act. Article 222 Copyright Act asserts that the exceptions mentioned do not apply for works and other subject matter made available online on the basis of an agreement.

In accordance with Article 6 (1) EUCD, Article 217 Copyright Act provides owners of copyright, related rights and the database maker right legal protection against the circumvention of any effective technological protection measures.

Technological protection measures are defined, according to Article 217 (2) Copyright Act, as any technology, device or component which in the normal course of its operation, is designed to prevent or restrict non-authorised acts in relation to works and other protected subject matter, other than a computer program. The clause indicates that the act of circumvention as such incurs liability. Therefore, neither does the Act recognize a self help right for users in order to read or otherwise enjoy a work without infringement of copyright nor does it require any subsequent result of copyright violation.

Article 6 (3) EUCD has been implemented literally in Article 217 (3) Copyright Act, which states that technological protection measures are "effective" when the use of the work or other protected subject matter is controlled by the copyright owner through an access control or protection process such as encryption, scrambling or other transformation of the work or other subject matter, or a copy control mechanism, which achieves the intended protection. The Act thereby affords protection to both access and control mechanisms.

Article 218 sets forth criminal liability for acts of circumvention of any effective technological measures which is carried out in the knowledge, or with reasonable grounds to believe, that that objective is being pursued. The act of circumvention carries a penalty of imprisonment for a term of up to one year or a fine of up to 100 days.

Attempts are punishable with a fine of up to 25 days. Criminal proceedings can be initiated even in the absence of a complaint.

Article 6(2) has been implemented in Article 219 Copyright Act. The provision is formulated, again, as an offence relating to dealings in devices and services which circumvent effective technological measures. Accordingly, a person commits an offence if he manufactures, imports, distributes, sells, rents, advertises for sale or rental, or possesses for commercial purposes devices, products or components or provides services which are promoted, advertised or marketed for the purpose of circumvention of effective technological measures, or have a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures. The act is punishable with a term of up to six months imprisonment or a fine of up to 50 days. Again, criminal prosecution is not dependent on a complaint being filed by the offended party. The defendant cannot claim ignorance in relation to a lack of knowledge. Therefore, even the defendant did not know, or had no reasonable ground to believe, that the device, product or component or the service, enabled or facilitated the circumvention of effective technological measures, criminal liability will be incurred regardless. In addition, civil liability is expressly foreseen under Article 226 Copyright Act. The same requirements apply.

Article 6 (4) EUCD has been implemented and the Act provides for certain exceptions in relation to photocopying for private purposes, but not of music notation, reproductions carried out by certain entities, such as public libraries, archives, museums or academic institutions, partial reproductions in the context of teaching, reproduction, communication to the public and making available to the public in favour of the disabled, public safety and administrative, parliamentary or judicial processes, reproduction of broadcasts carried out by non-profit-making institutions, such as hospitals and prisons, use of works, such as works of architecture or sculpture, made to be located permanently in public places, incidental inclusion of a work or other subject matter in other material, use in connection with the demonstration or repair of equipment, use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building, private use, use for scientific or academic purposes, temporary fixation carried out by broadcasting organisations, and fixation or reproduction by public entities for archival purposes, of phonograms, videograms and broadcasts, and, most notably, private copying, provided it does not conflict with the normal exploitation of the author's work nor unreasonably hinders the legitimate interests of the author, and the copies are not communicated to the public nor commercialized; fixation of broadcasts for archival purposes in certain cases.

Article 221 covers instances where, because of the application of an effective technological measure, a user is unable to carry out those permitted acts. The provision affirms that effective technological measures may not constitute an obstacle to fair use and that right holders should take voluntary measures, such as agreements between right holders or their representatives and users. In the absence of voluntary measures taken by right holders, beneficiaries may require that adequate measures be taken to

solve the case. These measures will be taken by the Commission for Mediation and Arbitration (*Comissão de Mediação e Arbitragem*). If mediation attempts fail, the decision can be taken to the Court of Appeals. This does not apply where works are made available to the public on agreed contractual terms, in such a way that members of the public may access them from a place and at a time individually chosen by them, Article 222 Copyright Act.

One particular problem the current context of technological protection measures protection and its interface with limitations might cause relates to the voidability of contractual terms eliminating or impeding the rights of beneficiaries. There is a clear conflict between the prohibition of contractual restrictions affecting the exercise of limitations and the fact that the law imposes criminal liability on the act of circumvention as such. As noted, contractual limitations cannot be enforced as against beneficiaries, and such clauses are void. This leaves open to what extent, on the basis of a mediation procedure, a right holder may be obliged to provide the necessary tools for providing access in the cases mentioned. Given that the Act establishes a system of stand alone protection for technological protection measures, it seems arguable that even though the Act aims to strike a balance, right holders may impose such restrictions eliminating or impeding the use by of beneficiaries for the sheer fact that technological protection measures can be applied. This leads to illogical results because the application of technological protection measures will define the scope of contractual permissions. Conversely, it seems predictable that a court, in the course of disputes arising under Article 221 Copyright Act, will take the view that the application of technological protection measures constitutes a contractual impediment and that contracts which restrict the scope of an agreement to the detriment of beneficiaries are void. Notwithstanding the above, right holders may limit by means of technological protection measures the number of reproductions which are allowed for private use.

Article 217(1) of Law No.50/2004 expressly states that the legal protection against the circumvention of any effective technological measures does not extend to computer programs. Art.13(2) of Decree-Law No.252/94, of October 20, which implemented the Computer Programs Directive (Directive 91/250), authorizes the apprehension of devices made available in the course of trade, whose sole purpose is to facilitate the non-authorised circumvention of any technical measure of protection of a computer program. This provision does not deal with the act of circumvention itself.

## **E. RIGHTS MANAGEMENT INFORMATION**

Articles 223 and 224 Copyright Act implement Art.7 EUCD. Art.223 provides legal protection for rights management information and defines RMI as any information provided by right holders which identifies the work or other subject-matter, information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

Article 224 states that the removal or alteration of any electronic rights management information, the distribution, importation for distribution, broadcasting, communication

or making available to the public of works or other subject matter from which electronic rights management information has been removed or altered without authority, if the person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright, when these acts are performed without authority, with knowledge, or with reasonable grounds to know, and intentionally, may lead to imprisonment for up to one year or a 100-day fine. Attempts will be punished with a fine of up to 25 days. Criminal prosecution can be initiated even if a complaint is not filed.

## **F. Sanctions**

As noted, specific criminal and civil sanctions apply with respect to both technological protection measures and Rights Management Information .

## XXIV SLOVAK REPUBLIC

The Slovak Republic implemented the Directive by the Act No. 618/2003 of 4 December 2003. The act is in force since the 1 January 2004.

The Act significantly deviates from the Directive in a number of important concerns. In relation to exclusive rights, the concept of European exhaustion is absent. In relation to limitations, a number of minor deviations can be observed which, given the non-mandatory nature of most limitations, will not cause too many problems as regards harmonisation. It is noteworthy, however, that claims for fair compensation can only be exercised in the case of private copies and reprography. The most significant divergence relates to the entire concept of implementing Article 6 which urgently needs to be revised.

### **A. Exclusive Rights**

The Slovakian Copyright Act makes provisions for all requested economic right under Articles 2 – 4 EUCD.

#### **I. *Reproduction Right***

Pursuant to Section 18 subsection 2 a Copyright Act 2003 the author has the right to authorise any use of the work including the making a copy of the work. The same right is provided for the performing artist (Section 63 subsection 2 c Copyright Act 2003), producer of phonograms (Section 63 subsection 2 a Copyright Act 2003), producer of audiovisual fixation (Section 66 subsection 2 a Copyright Act 2003) and to broadcaster (Section 68 subsection 2 c Copyright Act 2003). According to Section 5 (17) Copyright Act 2003, the term reproduction is defined as a “transfer of the work or part thereof on other material carrier, either directly or indirectly from the original of work or indirectly from another copy of work, temporarily or permanently, by any means and in any form”. Such copy can be realised, in particular, in the form or print, photographic, sound and audiovisual copy, by construction of work of architecture, or in form of other three dimensional copy, or in electronic form including both analogue and digital expressions. The Act therefore follows the broad definition under Article 2 EUCD closely.

#### **II. *Communication to the Public***

The Communication to the public right is defined in Section 3 (14) Copyright Act 2003, which provides an umbrella clause for certain acts of non-physical exploitation. The right of communication to the public is defined as a dissemination or performance of a work by any technical means for dissemination of sound or sound and images simultaneously, or of the representation thereof, by means of wire or without wire, in such a way that said work is perceivable by persons in places where it would not be possible to perceive this work without such communication. Communication to the

public includes cable retransmission, broadcasting and the making available to the public of a work.

Making available to the public is, according to Section 5 (11) Copyright Act 2003 the communication to the public in such a way that an individual may access it from a place and at a time individually chosen by him/her.

The transposition of the communication right is in accordance with Article 3 EUCD although Sec. 18 Copyright Act only refers to a general public communication right. The inclusion of acts of making available follows from Sec. 3 (14) Copyright Act 2003.

Both the rights of reproduction and communication to the public are provided for performing artists (Section 63 subsection 2 a and f Copyright Act 2003), producers of phonograms (Section 63 subsection 2 e Copyright Act 2003), as well as for producers of audiovisual fixation (Section 66 subsection 2 f Copyright Act 2003) and broadcasters. (Section 68 subsection 2 a and f Copyright Act 2003). The protection of producers of audiovisual works is not foreseen under Articles 2 – 4 EUCD. Protection is granted to works “perceptible by means of a technical device as sequence of related images with or without accompanying sound provided it is designed to be made available to the public.”

### **III. *Distribution Right***

The distribution right is contained in Section 18 subsection 2 b and c Copyright Act 2003 and is defined as the right to distribute the original of the work or of a copy thereof to the public by sale or any other form of transfer of ownership and by rental and lending. Distribution requires the transfer of ownership of the copy in question.

The distribution right under Section 18 subsection 2b Copyright Act 2003 is exhausted for the territory of the Slovak Republic after the first lawful sale or any other act of transfer of ownership of the original of the work or of a copy thereof realised on the territory of the Slovak Republic, this in respect of the original of the work and any copies thereof that were subject to said sale or any other act of transfer of ownership, Article 23 Copyright Act 2003.

The Act does not provide for the principle of community wide exhaustion. Exhaustion occurs once protected copies have been, for the first time, been put onto the domestic market. The distribution right is likewise applicable to performing artists (Section 63 (2)(d) and (e), producers of phonograms (Section 63 (2)(b) and (c) Copyright Act 2003), producers of audiovisual fixation (Section 66 subsection 2 b and c Copyright Act 2003) and to broadcaster (Section 68 subsection 2 d Copyright Act 2003).

## **B. Exceptions and Limitations**

Sections 24 pp Copyright Act 2003 provide limitations of the Economic rights.

The provisions of Section 24(1) and (6) to (10), Section 25, Section 28(1), (3) and (4), Section 30(1)(a) and (2) and (3), Section 31, Section 33(1)(a), (b) and (d), (2) and (3) and

Section 38 shall apply *mutatis mutandis* to the rights of performing artist, producer of phonogram, producer of audiovisual fixation and broadcaster.

It is noteworthy that the Act expressly implements the three-step- test in Section 38 Copyright Act 2003. Accordingly, limitations of economic rights of author shall be permitted only in special cases provided in provisions of Section 24 to 37. Disposal with a work pursuant to said provisions may not conflict with normal exploitation of the work and may not unreasonably prejudice the legitimate interests of author.

The Act does not contain specific limitation on neighbouring rights. According to Section 69 Copyright Act 2003 Section 24 subsection 1 and 6, Section 25, Section 28 subsection 1, 3 and 4, Section 30 subsection 1a, 2 and 3, Section 31, Section 33 subsection 1 a, b and d, subsection 2 and 3 and Section 38 shall apply *mutatis mutandis* to the rights of performing artist, producer of phonogram, producer of audiovisual fixation and broadcaster.

### **I. *Transient Copies***

Article 5-1 EUCD has been implemented almost literally by Section 32 Copyright Act 2003. Thereafter the copy of a work that is either transient or incidental and constitutes integral and essential part of a technological process, provided the sole purpose is a lawful use of work or a realisation of the transmission of work in a communication network between third parties by an intermediary, if it has no independent economic significance.

### **II. *Reprography***

Section 24 subsection 1 b Copyright Act 2003 permits a natural or legal person to make a copy of a disclosed work by transfer thereof onto paper or similar medium by means of reprographic device or other technical device without the authorisation of the author thereof. Furthermore this provision allows that this copy may be distributed to the public by sale or by other forms of transfer of ownership.

In accordance with the Directive subsection 3 d Copyright Act 2003 makes an exemption for this regarding music fixed in written form.

The author has a right to claim fair compensation under Sec. 24 (4) (see below). The right can be exercised either as against persons providing copying devices or by way of a collectively administered levy scheme on certain blank carriers.

### **III. *Private Copying***

According to Section 24 subsection 1 a natural person may make a copy of a disclosed work for his/ her private use. The permitted use must have no direct or indirect commercial purpose. The remuneration claim corresponding to Article 24 (1) (b) applies. The provision also applies *mutatis mutandis* to the rights of performing artists, producer

of phonogram, producer of audiovisual fixation and broadcasters. This implements Article 5 (2) (b) closely.

#### **IV. *Libraries and Archives***

Section 31 Copyright Act 2003 allows libraries and archives to copy a work from its own collections for the purpose to satisfy the request of a natural person who will use the copy for the purpose of education or scientific research exclusively within the premises of the library or achieve or for the purpose of replacement, achieving or preservation of the original of the work or of a copy thereof in cases of loss or destruction or damage, or where the permanent collection is being constituted. In contrast to the Directive Section 31 Copyright Act 2003 does not require a “publicly accessible” library and does not mention that the reproduction must not be for direct or indirect economic or commercial advantage. The provision also applies to neighbouring rights.

#### **V. *Broadcasters***

Pursuant to Section 69 subsection 2 Copyright Act 2003 a broadcaster may make an ephemeral fixation of his/her/its broadcasting by means of its own equipment and for its own broadcasting. The broadcaster is entitled to archive such ephemeral fixation only if it has exceptional documentation value. In difference to this the Directive allows only the preservation of these recordings in official archives on the grounds of their exceptional documentary character.

#### **VI. *Quotations***

According to Section 25 Copyright Act 2003 a short part of a disclosed work may be used in the form of a quotation in another work without the authorisation of the author only for purposes of teaching and scientific research of the disclosed work. However the author and the source have to be indicated if possible. The limitations applies to related rights likewise (Sec. 69 (1) Copyright Act 2003). In difference to the Directive the quotation is permitted only to the extent justified by the purpose of the quotation. Beside this Section 28 Copyright Act 2003 permits to use a work to the extent justified by teaching purposes in school. It does not have to be realised to gain any direct or indirect economic advantage.

The Act makes no provision for the purpose of *scientific* research. Section 30 Copyright Act 2003 allows using the work in an admission- free school performance in which exclusively pupils, students or teachers of school perform and the use of a school work in the course of charge- free fulfilment of duties falling under the subject matter of the activity of a school.

#### **VII. *People with Disabilities***

Section 29 Copyright Act 2003 allows the use of a work to cater the needs of handicapped to the extent justified by their handicap and if it is not realised to gain any direct or indirect economic advantage.



### **VIII. *News and Current Events***

Section 33 subsection 2a and d Copyright Act 2003 permits to make a copy of a work disclosed in a newspaper or other medium be it in particular on current economic, political or religious events or topics, communicate it to the public or distribute it to the public with such content. This shall not apply where an author reserved the right to authorise reproduction and communication to be public in particular cases. Beside this Section 33 subsection 2b Copyright Act 2003 permits to reproduce and communicate a short part of a work perceivable in the course of current events being the subject of news reporting. This provision differs from the Directive as it does not limit the use to the extent justified by the informatory purpose.

According to Section 69 subsection 2 a Copyright Act 2003 broadcaster may use a short part of the work, artistic performance, phonogram, audiovisual fixation or broadcast of another broadcaster within its news reporting to justified extent. There are some deviations from Article 5 (3) (c) EUCD in that a *current* event is not required. This might be solved by defining news reporting as reporting on current events. Secondly the provision is not qualified to the extent justified by the informatory purpose. Another problem is caused because Section 69 Copyright Act 2003 does not require the indication of the author and the source.

### **IX. *Review or Criticism***

According to Section 25 Copyright Act 2003 a short part of a disclosed work may be used in the form of a quotation in another work without the authorisation of the author only for purposes of review or criticism of the disclosed work. However the author and the source have to be indicated if possible. In contrast to the Directive the quotation is only allowed to the extent justified by the purpose of the quotation. The quotation for artistic purposes is permitted und the same conditions. This limitation is not foreseen under the Directive.

### **X. *Public Speeches***

Pursuant to Section 33 subsection 1 c and d Copyright Act 2003 it is permitted to reproduce, distribute and communicate to the public a lecture, speech or other word of similar nature delivered in public.

### **XI. *Ceremonies***

According to Section 30 subsection 1 a Copyright Act a work can be used in the course of admission- free civil ceremonies or admission- free religious ceremonies. This provision is narrower than the Directive as it requires admission-free ceremonies. Beside this it does not say that the civil ceremony has to be organised by a public authority.

## **XII. *Works in Public Places***

A work permanently located in a public place may be expressed by drawing, painting, graphics, relief picture or relief model or be fixed in a photography or in a film. A work such expressed or fixed may be reproduced, distributed or communicated to the public, Section 27 Copyright Act 2003. This differs from the Directive as it does not require a work such as architecture or sculpture.

## **XIII. *Advertisement for Exhibitions etc.***

Pursuant to Section 26 subsection 1 Copyright Act 2003 it is permitted to copy or distribute a work for the advertisement of exhibitions of artistic works or auctions of artistic works to the extent necessary for such an advertisement. The author and the source have to be indicated if possible. In contrast to the Directive a public exhibition is not requested.

## **XIV. *Direct Display***

Section 37 Copyright Act 2003 permits the direct display of an original of a work or a copy thereof, where the public display is of the original of a work that has been sold, or the ownership of which has been otherwise transferred to a natural person or legal entity regarding whom the author knew that the activity in question was part of his/her/its customary activity or where the public display does not conflict with the fair exploitation of the original of the work or a copy thereof and does not otherwise interfere with the rights of the author. Public display is defined as the “showing of the original of work or of copy thereof on the public directly or indirectly, by means of a slide, television image or by a similar means on a screen; in the case of an audiovisual work the showing of an individual still image non-sequentially. (Sec. 5 (16) Copyright Act 2003). Although such limitation is not foreseen under the EUCD, the restriction to slides or television images apparently excludes online “displays” of computer generated or digital images. However, this is not entirely clear. If the provision applied to digital images, a potential conflict with the communication to the public as well as the right of reproduction can be ascertained. The provision may be employed as a defence to uses in libraries and other establishments.

## **C. Compensation System**

According to Section 24 subsection 4 Copyright Act 2003 the author has the right to remuneration in case of copies on paper or for private use (Secs. 24 (1) and (2) Copyright Act 2003). Compensation is to be paid to a collecting society by the manufacturer or importer of blank recording carriers, equipment for making copies of the phonograms or audiovisual fixations, of reprographic devices or other technical devices for making copies of the work and on personal computers.

Furthermore, compensation can be claimed from the natural person who provides the reproduction services for payment and as against dealers of carriers, equipment or devices. The compensation claim must be exercised and administered through a

collective administration organisation. It is to be paid by the manufacturer or importer of blank recording carriers usually used for reproduction pursuant to Subsection (1), in amount of 6 % of the sale price or import price of the carrier, or the manufacturer or importer of equipment for the making of the copies of the phonograms or audiovisual fixations (“the equipment” hereinafter), in amount of 3 % of the sale price or import; the manufacturer or importer of reprographic devices or other technical devices for the making of the copies of work (“the device” hereinafter), in amount of 3 % of the sale price or import price of said devices; shall the device be integral part of the material object, the compensation of remuneration shall be paid of the aliquot share of the sale price or import price of such material object; the manufacturer or importer of personal computers, in amount of 0,5 % of the sale price or import price of the hard disc incorporated into a personal computer; or the natural person who, or legal entity which, provides the reproduction services against the payment, in amount of 3 % from the total income resulting from said services; or the dealer of the carriers, equipment or devices instead of persons liable under (a) to (c). The persons named are liable as joint debtors.

No claim for compensation can be exercised in case the carriers, equipment or devices are exported or used for private purposes of the importer.

Section 24 (9) Copyright Act 2003 contains a provision on duties to provide collecting societies with information on the number of carriers, devices and equipment imported or put on the market.

The compensation system under the Copyright Act 2003 does not take account of the application or non-application of technological measures.

## **D. Protection of Technological Measures**

The provision on technological protection measures has been partially implemented in Secs. 59 Copyright Act. the transposition departs in a number of respects from the wording of Article 6 EU CD and creates an almost excessive scope of technological measures protection. Protection is afforded to owners of copyright as well as owners of all related rights (Sec. 71 Copyright Act 2003).

The most remarkable feature of the implementation of Article 6 is the lack of a separate implementation of Article 6 (1). Certain traces of both Article 6(1) and 6(3) EU CD are to be found in Sec. 59 (1) Copyright Act 2003 which provides that copyright is infringed by anyone who, in order to achieve economic gain by the provision of services or by other manner develops, produces, offers for sale, rental or lending, imports, distributes or uses equipment designed exclusively or partly for removal, disablement or inhibition of the operation of any device or technological measure for the protection of rights pursuant to this Act

In relation to the act of circumvention, Sec. 59 (1) thus refers to the use of equipment designed exclusively or partly to facilitate acts of circumvention. There are certain problematic issues as regards that technique of implementation. This is because Sec. 59 (1) requires an element of commercial gain in the first alternative, which would then

allow acts done for private and other purposes; this, however, is only the case if the words “commercial gain” were read as referring to both alternatives.

Indeed, such conclusion seems unlikely to be persuasive because (1) the wording makes it clear that commercial gain need be present as regards the offering of services only, and (2) because Sec. 24 (10) Copyright Act 2003 preserves the right of persons applying technological as against the limitations for private copying. Given that such reservation precludes from a notion of a positive users right to circumvent, the inference can be drawn that the use of anti circumvention devices as prohibited under Sec. 59 (1) Copyright Act 2003 must be considered a tort without any requirement of commercial gain. This conclusion is supported by the doctrinal categorisation of acts described as acts of “copyright infringement”. If commercial gain was a requirement for copyright infringement under Sec. 59 (1), the effect would arguably be to render Sec. 24 (10) irrelevant since this provision exclusively applies for strictly non-commercial acts of reproduction and, therefore, an act of circumvention with the intent to gain commercial profit would not be covered under the limitations referred to in Section 24 (10) Copyright Act 2003. However, the issue remains ambiguous and the technicality of implementing both sets of rules under Article 6 into one single provision is likely to create deviances and confusion.

According to Sec. 24 (10), the limitations under Secs. 24 (1) and 24 (2) Copyright Act 2003 shall not prejudice the “protection of measures to prevent unauthorized making of the copy of work as well as any other unauthorized act”. Consequentially, right holders who apply technological protection measures can, in case such measure is circumvented, rely upon an act of copyright infringement irrespective as to whether the person committing the act can rely upon either limitation.

Article 59 (1) Copyright Act 2003, furthermore, equates the act of TPM circumvention with an infringement of an author’s economic right. The provision expressly refers to an act of copyright infringement and expressly refers to acts of circumvention etc. as illicit interference with copyright, rather than providing for a liability rule based upon a preliminary or contributory act. Given the wide definition of protected technologies, this may cause difficulties in relation to the object of protection. Although apparently some nexus between copyright protection and technological measures must be present in that the technological measures have to be related to a work, the way in which Article 59 Copyright Act 2003 has transposed Article 6 (1) and (2) EUCD leaves ample scope for alternative and creative interpretations. Again, the scope of Section 59 (1) Copyright Act 2003 will ultimately depend upon whether or not a commercial intention need be present.

One possible interpretation is to construe the term “illicit interference” as relating to an act infringing primary economic rights only; the effect would be to restrict the scope and to introduce a necessary element of both purpose of TPM’s applied and the requirements as to intention of the alleged infringer. However, such narrow interpretation seems hardly reconcilable with the wording of Sec. 59 (1) in that the

application of technological measures provides the owner with an exclusive right akin to economic right on the sheer basis of applying access or copy controls.

According to Section 59 subsection 2 Copyright Act 2003, which implements Article 6 (2), a technological measure shall mean any procedure, product or component incorporated into procedure, product or equipment that shall prevent, restrict or exclude the illicit interference with copyright in a work. The term “illicit” is not further elaborated but encompasses a range of technologies which provide both access and copy control. The definition of what constitutes eligible measures differs from the Directive as Sec. 60 Copyright Act 2003 does not require that the purpose of measures applied must be to prevent copyright infringement in “the normal course of its operation”. Likewise, the measures need not be effective, and hence no definition for “effective” is provided. It is also remarkable that an act of circumvention does not require any element of knowledge or, or at least a reason to assume that the technology is used for accessing or copying a work of copyright. Once again, this is complicated by the uncertainty as to whether the use of anti circumvention must be carried out with the intent to obtain commercial gain (see above).

The provision also deviates from Article 6 (2) as regards in that the offering for services is subject to commercial gain, an element not foreseen at all under the directive. The effect is that a service offered without a commercial purpose is free to distribute circumvention technology if this is done for altruistic motives. Sec. 59 (1), additionally, makes no provision in relation to advertising for sale and promoting circumvention technology.

## **E. Rights Management Information**

Article 7 EUCD has been transposed in Sec. 60 Copyright Act 2003. sec. 60 prohibits the removal or alteration of any electronic rights-management information, as well as the b) distribution to the public of original and copies of a work, including importation thereof, as well as communication to the public of a work from which electronic rights-management information had been removed or altered without the consent of author.

Rights management information is defined as “data which identify the work, the author of the work, the holder of any right in the work, information about the terms and conditions of use of the work and any digits or codes that represent such information, when any of these information items is attached to a copy of a work or appears in connection with the communication of a work to the public.

According to Section 60 Copyright Act 2003 the removal or alteration of any electronic rights management information or distribution to the public of original and copies of a work, including importation thereof, as well as communication to the public of a work from which electronic rights- management information had been removed or altered without the consent of the author shall be deemed as illicit interference into copyright.

## **F. Sanctions**

Section 56 subsection 1 Copyright Act 2003 provides special sanctions concerning technological measures and Rights Management Information. Thereafter the author whose copyright has been subject to illicit interference, or whose copyright is subject to danger of illicit interference may demand in particular the prohibition of menace to his/her copyright, including the prohibition of the repeating menace or the prohibition of illicit interference into his/her right, including the prohibition of the interference pursuant to Section 59 and 60. Moreover he can demand removal of consequences of the interference into his/her copyright, in particular by removal of unlawful produced copy of the work or of a counterfeit of a work or of equipment pursuant to Section 59 and 60 from sale or other use or by destruction of this copy or equipment.

All other applicable civil sanctions apply in addition. According to this the right holder has the right for appropriate compensation for the caused prejudice of a non-material character in particular by apology and by monetary compensation (Section 56 subsection 1 c Copyright Act 2003).

The right to be compensated for damages and to request the surrender of unjust enrichment as provided in respective legislation is left unaffected by this. The same sanctions apply in relation to violation of Sec. 60 Copyright Act 2003. The Copyright Act 2003 does not provide for criminal sanctions.

## XXV SLOVENIA

Slovenia implemented the Directive with the Act amending the copyright and related rights act, Official Gazette RS No. 43/04. The act entered into force on 24 April 2004<sup>286</sup>.

### **A. Exclusive Rights**

The Slovenian Copyright Act already contained the traditional rights of reproduction, distribution and communication. The act contains an open umbrella clause (Article 21) and an enumeration of specific economic rights divided into material and non-material (communicative) uses. The Act describes the right of reproduction as the exclusive right to fix the work in a material medium or in another copy directly or indirectly, temporarily or permanently, by any means and in any form, in whole or in part (Article 23(1)). Article 23 (2) expressly declares that “saving in electronic form” forms part of the reproduction right though it makes no provision as such on transient copies during online transmissions.

Article 23 contains the distribution right under which the author is granted the right to put the original or copies of the work into circulation by sale or other form of transfer of ownership, or to offer the same to the public with such intent. Article 23 (2) contains a slight extension of the distribution right under which the author additionally has the right to prohibit any import of infringing copies into third countries. (“The right of distribution includes also the exclusive right to import copies of the work to a country with the intent of their further distribution, regardless whether such copies were legally made or not”). The Slovenian Copyright Act has also been amended so as to introduce the principle of European exhaustion (Article 43). The Act requires a transfer of ownership by or with consent of the right holder. This leaves open the possibility for the application of the exhaustion doctrine in cases of online uses (such as downloads) .

The Act, additionally, protects performers, phonogram producers and broadcasters in accordance with the Directive. Article 118 defines performers as directors of theatrical presentations, conductors of orchestras, choir directors, sound editors, and variety and circus artists. Performers are granted exclusive rights as to 1. to fix their live performance; 2. to reproduce the phonograms or videograms containing their performance; 3. to publicly transmit their live performance; 4. to broadcast their live performance; 5. to make available to the public the phonograms or videograms containing their performance; 6. to distribute the phonograms or videograms containing their performance. 7. to rent phonograms or videograms containing their performance. These provisions are in line with the Directive. Article 128 furthermore provides for exclusive rights of phonogram producers which include the reproduction, distribution and making available rights as well as granting an exclusive right of transformation (adaptation) and rental right.

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<sup>286</sup> English translation available under: [http://www.uil-sipo.si/Laws/ZASP\\_EN\\_04.pdf](http://www.uil-sipo.si/Laws/ZASP_EN_04.pdf)

Article 134 enumerates broadcasters' rights. These rights go beyond the Directive's provisions and not only provide for a fixation, rebroadcasting and public secondary broadcasting right but also include the right of making available.

## **B. Exceptions and Limitations, Article 5**

The Act has implemented only few of the non-mandatory provisions of the Directive, most of which had already been part of the Copyright Act.

### **I. *Transient Copies***

Article 49a Copyright Act 2004 implements the Directive almost literally. Temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work, and which have no independent economic significance shall be free. THE Act does not clarify the meaning as to what constitutes a lawful use.

### **II. *Reproductions on Paper***

Article 50 (1) Copyright Act permits the reproduction of published works up to a quantity of three copies. The reproduction must be carried out by a natural person and be made on paper or a similar medium by photographic technique or a similar process. Additionally, a natural person may make reproductions on any medium in accordance with Article 37(2) if this is done for private purposes and without any direct or indirect commercial purpose. The main discrepancy with regard to Article 5(2)(a) EUCD is the limitation to natural persons.

Article 50 paragraph 2 recital 1 Copyright Act 2004 allows a natural person to reproduce on paper or any similar medium by the use of a photographic technique or by some other process having similar effects. This does not apply to musical works (Article 50 paragraph 4 Copyright Act 2004). In contrast to the Directive this limitation only applies to natural persons.

### **III. *Private Copying***

Pursuant to Article 50 paragraph 2 recital 2 Copyright Act 2004, a natural person shall be free to reproduce works on any medium not mentioned in Recital 1 if this is done for private use, and if this is not done for direct or indirect economic advantage. Copies made in such way must not be made available to the public.

### **IV. *Libraries, Museums, Archive etc.***

Article 50(3) permits reproductions by publicly accessible archives, museums and educational institutions as well as libraries and educational or scientific establishments. The provision only allows such reproductions for (1) internal uses and (2) from existing ("own") copies held in such establishment. The provision does not permit any direct or



indirect commercial advantage. The definition of what constitutes such advantage is open and may well reduce the scope of the limitations to purely non commercial establishments. Reproduction of whole books, graphic editions, electronic databases and computer programs are not, save for specific provisions, permitted. The provision is slightly wider than Article 5 (2) (c) as it additionally allows reproductions made by scientific establishments.

#### **V. *Disabled People***

To implement this provision, Article 47a Copyright Act 2004 was inserted. Thereafter it shall be lawful to reproduce or distribute works for the benefit of people with a disability, provided that the work used is not available in the desired form, that the use is directly related to the disability and limited to its extent and is not for direct or indirect economic advantage. However an equitable remuneration has to be paid.

This provision is narrower than the Directive. It differs as it requires that the work is not available in the desired form and the payment of remuneration. Beside this the expression “non- commercial nature” is replaced by the term “no economic advantage”.

#### **VI. *Public Security***

Pursuant to Article 56 Copyright Act 2004 the use of works shall be free if this is indispensable, in certain specific cases, for the performance of tasks relating to public security or the performance of any official proceedings, such as proceedings in the National Assembly or Nations Council of the Republic of Slovenia, or judicial, administrative or arbitrary proceedings.

#### **VII. *Public Exhibitions***

According to Article 54 Copyright Act 2004 the organiser of a public exhibition or sale of artistic work shall be free to use such works to the extent necessary to promote the event, provided that this is not done for direct or indirect economic advantage. The source and the authorship have to be indicated.

#### **VIII. *Works of Architecture,***

Article 44 Copyright Act 2004 permits that the owner of a work of architecture which has been executed make reconstructions thereof. This differs from the Directive as it permits the reconstruction instead of the use of an artistic work in form a building or a drawing or plan of building for the purpose of reconstructing the building.

#### **IX. *Current Events***

Article 48 provides for certain limitations for purposes of reporting current events. The limitations apply with respect to both reproductions and communications to the public.

The source and author must be indicated if such information is provided in the source copy.

Article 48 (1) Copyright Act permits the use of works capable of being seen or heard as part of a current event reported on; Article 48 (2) allows the preparation and reproduction of abstracts of published newspaper and similar articles in the form of press reviews; Article 48 (3) permits the reproduction of public political speeches and public speeches made at hearings before state, religious or similar bodies. Article 48 (4) permits the use of news of the day, which have the nature of a press release.

### **C. Compensation System**

According to Article 147 Copyright Act 2004 the rights holder has the right to receive remuneration in connection with the private or internal reproduction of a work. The levy scheme is based upon mandatory collective management. Articles 37-39 establish a levy scheme in relation to photocopying and reproduction of sound and images on audio and video tapes. The levy is collected by a collecting society. This is compulsory. It is payable on both devices and blank carriers (audio and video). There is no specific provision relating to digital carriers despite the fact that the Act foresees a claim for remuneration in this case.

### **D. Technological Protection Measures**

According to Article 166a paragraph 1 Copyright Act 2004 the circumvention of effective technological measures designed to protect authors' works or subject-matter of related rights shall be deemed as an infringement of exclusive rights.

In contrast to the Directive knowledge or reasonable grounds to know that a person is pursuing such objective is not required.

The provision defines both the circumvention of technological measures as well as commercial dealings in anti-circumvention technologies as infringement of copyright. This indicates neither an act of copyright infringement must necessarily result, nor that any intention to commit such infringement must be present. Therefore, Article 166a Copyright Act specifies a discreet tort of copyright infringement even in cases where no reproduction or other illegal use of a copyright work succeeds.

Measures are deemed effective where the use of a copyright work or subject-matter of related rights is controlled by the right holder through the application of an access control or protection process such as encryption, scrambling or other transformation of the work, or a copy control mechanism, which achieves the protection objective (Article 166a paragraph 3 sentence 2 Copyright Act 2004). Protection is thereby given to both access and copy control measures.

Article 166a provides, in accordance with Article 6(1) EUCD, that such measures must be both effective and designed to protect copyrightable works. There is no further

definition on when such measure is deemed to be effective nor when a circumvention tool has the necessary quality.

The definition of what constitutes technological protection measures follows closely the text of the Directive. According to Article 166a(3) Copyright Act, “Technological measures” shall mean any technology, device, product, component or computer program or other measure that, in the normal course of its operation, is designed to prevent or restrict acts which are not authorized by the holder of rights under this Act. These measures shall be deemed effective where the use of a copyright work or subject matter of related rights is controlled by the right holders through application of an access control or protection process such as encryption, scrambling or other transformation of the work, or a copy control mechanism, which achieves the protection objective.

The prohibition in Article 166a (1) Copyright Act relates to both authors rights and neighbouring rights. The effect under the Slovenian Act is that encrypted broadcasting signals are subject to circumvention control, a right which can be enforced by broadcasting organizations in the case of Internet transmissions.

Article 166a(2) Copyright Act transposes Article 6(2) EUCD. As noted, a violation of Article 166a(2) is perceived as infringement of exclusive rights rather than a liability rule. According to Article 166a(2) Copyright Act, the manufacture, import, distribution, sale, rental, advertising for sale or rental or possession for commercial purposes of technologies, devices, products, components or computer programs, or provision of services which are promoted, advertised or marketed for the purpose of the circumvention of effective technological measures, or have only a limited commercially significant purpose or use other than to circumvent effective technological measures, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures are prohibited. This implements the Directive literally.

Article 6(4) EUCD has been implemented in Articles 166b and 166c Copyright Act. Article 166b devises a general obligation for right holders applying technological measures to clearly mark any copy manufactured or imported for commercial purposes with information concerning the use of technological measures and its effects as well as details of the firm and address. Whilst the first paragraph of Article 166b is clear, the consequences of non-compliance with Article 166b (2) remain unclear. Under that provision, the obligation to provide address details etc. is linked to the enforcement of limitations by beneficiaries. One particular problem this could cause is the question whether the non-compliance with that provision will result in a general civil liability on grounds that a copy in which such measures have been applied may be qualified as faulty under consumer protection or general sale of goods law.

In addition, the provision does not make reference to any legal consequences of non-compliance.

The core elements of Article 6(4) EUCD have been implemented in Article 166c Copyright Act. The provision is structured into three sub-paragraphs. According to Article 166c (1) Copyright Act, right holders applying technological protection measure must make available appropriate means at the request of certain beneficiaries in order to enable access. It is noteworthy that the provision makes it a condition that any beneficiary requesting so must have “legal access to the subject matter of rights”, which indicates that either the beneficiary is the owner of a legal copy or has a contractual access right. Under a different interpretation, the term “legal access” may be construed so as to merely refer to the status as beneficiary, in which case the reference would be redundant. Under the former construction, it seems difficult to reconcile the purpose of Article 166c(1) with its intention to provide access should such request not be based on existing contractual agreements.

In case the right holder fails to comply with requests made under Article 166c(1), Article 166c (2) envisages a mediation procedure. The procedure must be initiated by the beneficiary requesting access and is to be conducted by a mediator to be proposed by a collecting society or a “representative organization of users”, Article 163 Copyright Act.

Beneficiaries privileged under Article 166c are enumerated conclusively. Limitations which apply concern Article 47a (Use for people with a disability), private and other internal reproductions (Article 50), performance of official proceedings (Article 56) and use for the purpose of teaching (Article 49). In addition, broadcasting organizations may request mediation in cases of ephemeral recordings, Article 77 (2) Copyright Act. Under this provision, following an assignment of the broadcasting right, a presumption operates which allows the broadcasting organization to deliver ephemeral fixations to a public archive if such fixations have exceptional documentary value.

Article 166a(5) contains a remarkable deviation from the Directive. It permits the circumvention (i.e. exempts from infringement) of technological protection measures for certain uses connected with public administration and the judiciary, namely in “certain special cases of the performance of tasks relating to public security, or in order to ensure the correct execution of any official proceedings, such as proceedings in the National Assembly or National Council of the Republic of Slovenia, or judicial, administrative or arbitrary proceedings”. The provision, though it might prove to be practically negligible, deviates from the Directive in that it relies on existing limitations for certain public duties and proceedings without requiring any prior consent by or participation of the right holder. The Directive does not provide for any immediate exemption from the protection of technological measures. Article 6(4) EUCD indicates that Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5-3-e EUCD. It can also be observed that the scope of the limitation as regards public duties appears rather wide.

Certain re-exceptions to the enforcement of limitations have been implemented in Article 166c (4) Copyright Act. According to Article 166c (4), paragraphs 1, 2 and 3 do not apply where technological measures are used for fulfilment of a right holder’s

obligation under paragraph 1, and for the implementation of agreements concluded for this purpose and protected works that are used, on the basis of an appropriate contract, within the meaning of Article 32a Copyright Act. In practice, this denotes that beneficiaries cannot demand access to information which has been protected following an agreement made with the right holder.

## **E. Rights Management Information**

Article 166 transposes Article 7 EUCD. The provision nearly implements the wording of the Directive literally and provides protection against the (1) the removal or alteration of any electronic rights-management information; (2) the reproduction, distribution, importation for distribution, rental or communication to the public of a copyright work or subject matter of related rights, where electronic rights-management information has been removed or altered without authority”.

Rights-management information is defined broadly so as to cover “any information provided by right holders on the identification of the subject matter of rights, the author, the right holder, the terms and conditions for use, and their relevant numbers and codes, when they are indicated on a copy of a copyright work or subject matter of related rights or when they appear in connection with their communication to the public.

Acts of removal or circumvention of DRM information are, as with technological protection measures, deemed as an infringement of copyright.

Article 166 (4) provides that the prohibition as set forth in Articles 166 (1) and (2) shall apply, *mutatis mutandis*, also to any technology, device, product, component or computer program by which electronic rights-management information referred to in Article 166 is removed or altered.

## **F. Sanctions**

The Act provides for both civil and criminal sanctions. Civil law sanctions are applicable in all cases violating the provisions on technological protection measures and Rights Management Information systems. The Act does not contain specific sanctions nor does it limit the sanctions for circumventing acts etc. but refers to the general provisions on infringement of copyright and neighbouring rights.

Criminal law sanctions only apply as against commercial offenders. Pursuant to Article 184 paragraph 1 Copyright Act 2004, a fine of no less than SIT 400,000 shall be imposed for a misdemeanour on a legal entity or individual sole trader who circumvents effective technological measures or manufactures, imports, distributes, sells, rents, advertises for sale or rental, or possesses for commercial purposes a technology, device, product, component or computer program or provides a service for the purpose of circumvention of effective technological measures in the cases referred to in Article 166a Section 2 Copyright Act 2004.

A fine of no less than SIT 80,000 shall be imposed on the responsible person of a legal entity that commits a misdemeanour referred to in Article 184 paragraph 1 Copyright Act 2004.

A fine of no less than SIT 80,000 shall be imposed on an individual who commits a misdemeanour referred to in Article 184 paragraph 1 Copyright Act.

Articles which are created by the misdemeanour shall be confiscated.

## XXVI SPAIN

Spain implemented the Directive by publication in the official journal on 7 July 2006., following a proposed Bill (No. 121/000044). In July 2005, the Council of Ministers approved the bill and submitted it to Parliament. The Bill was published on 26 August 2005.

Previous attempts to implement the Directive had failed, although a first draft was presented as early as November 2002. The main reason for the delay was that the implementation was coupled with the more complex aspiration to fully reform the system of collecting societies and their control, and that the Bill met with a lot of controversy and opposition from its addressees. The rather heated public debate induced the government to await further clarifications. The new government only began to work on the draft later and introduced the bill into parliament in August 2005.

### **A. Exclusive rights**

The Act states, that authors are granted full control, and the exclusive right to exploit the work, which is taken so as to function as a general rule vesting extensive exploitation rights in the author, Article 2 Copyright Act.

The Act deals with neighbouring rights under Part II. These include rights of performers, phonogram producers, videogram producers and broadcasting organisations. The provisions refer, as regards exclusive right, to the rights enjoyed by authors. The implementing instrument, additionally, added the reproduction right under Article 2 and the communication to the public right under Article 3 EUCE to the enumeration of exclusive rights of performing artists. The implementation, in addition to the provisions to be implemented under the EUCD, also concerns the introduction of moral rights for performing artists.

#### **I. *Reproduction Right***

The reproduction right is contained in Article 18 Copyright Act. It has now been update in accordance in accordance with Article 2 EUCD.

The language of the provision refers, in contrast to Article 2, to fixations. The previous text defined the reproduction right as the right to prohibit the incorporation of the work in a medium that enables it to be communicated sand copies of all or part of it to be made. The updated text mentions the inclusion of temporary and indirect copies.

#### **II. *Communication to the Public***

Article 3 EUCD was implemented in Article 20 (2) (i) Copyright Act. it was systematically included in the provision on communication rights and now covers any form of online exploitation. The consequences of implementing Article 3 EUCD have been extensively debated. Authors and performing artists have demanded the

introduction of a specific remuneration clause for acts of making available and communication to the public. This was achieved under Article 90 (4) Copyright Act, according to which authors of audio-visual works may claim remuneration in accordance with the general collective administration scheme explicitly for acts of communication to the public under Article 20 (2) (i) Copyright Act.

Likewise, a claim for equitable remuneration can be exercised by performing artists under Article 108 (2) Copyright Act. Performers are granted an unwaivable right that cannot be overridden by contract, Article 108 (5) Copyright Act. .

In the case of sound recordings, specific provisions apply with regard to the transfer of rights.

The remuneration is to be paid by commercial exploiters of performances as a statutory remuneration right by producers (i.e. the entertainment industry) for making works and performances available over networks. It applies irrespective of specific contractual transfers or waivers.

The Spanish Act already comprises provisions which allow authors and performers to claim a remuneration right in addition to a transferable exclusive right in other cases, which have been extended to acts of making available.

### **III. *Distribution Right***

The distribution right is contained in Article 19 Copyright Act. It currently provides that distribution covers acts of making the work available to the public by sale, hiring, lending or any other manner. This was changed so as to reflect Article 4 EUCD, in particular as regards the clarification that “any other manner” does not refer to online uses. The European exhaustion principle is already existent following the implementation of the Rental and Lending Directive. There is no remuneration for lending which is deemed a non-profit activity<sup>287</sup>. The provision is entirely in line with Article 4 EUCD.

## **B. Exceptions and Limitations**

Only few of the exceptions and limitations were introduced or reorganized. The law, to a significant degree, already contained limitations provided under Article 5 EUCD.

### **I. *Transient Copies***

Article 31 (1) implements Article 5 (1) EUCD maintaining its exact wording. The bill expressly clarifies the meaning of lawful use as referring to acts authorized by the right owner or permitted by law, following Recital 33 EUCD. At present, as far as liability of intermediaries is concerned, the area is governed by Articles 13 – 17 of Act 34 of 11 July 2002 (which implement the Directive on Electronic Commerce).

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<sup>287</sup> See the recent decision in *Commission v Spain*, Case C 36/05.



## **II. Reprography**

There is no dedicated reprography exception under Spanish law. Reprography is part of the general private copying limitation under Article 31 (2) Copyright Act. Both digital and analogues reproductions are, therefore, treated equally. Remuneration is paid, however, for certain forms of reprography in public places. A dedicated collecting society (CEDRO) is responsible for collecting levies for acts of reprographic copying since 1987 (“public copying license”). The license was primarily introduced to cover mass market photocopying reproductions which went beyond the purpose of the former law to generally exclude all acts of private copying, for which remuneration is collected by way of levies on copying devices. The bill therefore continues with the scheme, under which copying equipment may be subject to both payments of levies and a public licensing payment imposed on operators of copy shops etc.

## **III. Private Copying**

A private copying exception existed under Article 31 Copyright Act and was changed to form a new Article 31 (2) Copyright Act. This provides that works disclosed to the public may be reproduced for private purpose of the person making the copy, provided the copy is not used for collective or gainful purposes. This was changed to “made by a natural person for private use”.

The copy must be made from a lawfully acquired copy and must not be used for subsequent collective or commercial use. The term “collective” refers to any subsequent use outside the private sphere – therefore, a copy may be distributed or made available for a closed circle of family or friends but not made available to the public, or used for public communication purposes.

The Spanish law makes it a condition that the source copy was lawfully acquired. The term ‘copy’ refers to a tangible carrier and thus seems to restrict the private copying exceptions to works purchased (the Spanish terminology – ‘*ejemplar*’ – refers to physical carriers). This precludes any private copying from file sharing networks if the copies made available are infringing. The Spanish law imposes liability in relation to any copy downloaded, irrespective of whether the infringing status was obvious or not. The practical exclusion of copies made from any online source was, interestingly, criticised by the Spanish collecting society (SGAE), since it will prevent any claim for remuneration, irrespective as to whether the source copy downloaded was infringing.

It is not entirely clear whether this allows third parties to make copies. Under existing law, the view was that a copy may be made on behalf of a person fulfilling the private copying requirement, though the Act itself is silent on the issue.

In accordance with both Articles 5 (2) (a) and 5 (2) (b), the law maintains the remuneration system, which will continue to be relevant in respect of reprographic copying under Article 25 Copyright Act. Article 25 Copyright Act previously expressly only covers traditional copying devices such as photocopiers and blank carriers.

However, the extension of the scheme to digital equipment and carriers is debated. According to judicial opinion, Article 25 Copyright Act did not previously extend the claims for authors and performers to digital copying equipment.<sup>288</sup> Now, Article 25 (2) specifically asserts that the scheme applies to equipment and supports for making digital copies. Consequentially, a levy was introduced for disks, CD-ROM's and recordable DVD's and CD's. Particulars of the levy scheme are discussed *infra*<sup>289</sup>

#### **IV. *Libraries, museums and archives***

The Spanish Act deals with institutional exceptions under Article 37, which permits museums, libraries, record and film libraries, newspaper libraries and archives to reproduce and works in public ownership or part of the establishments' collection. It is a condition that "no gainful interest" is present, which was not be modified so as to transpose the somewhat wider "non-commercial" purpose requirement under Article 5 (2) (d) EUCD. It is understood that such copies are implicitly non-commercial since Article 37 (1) Copyright Act additionally requires a research purpose. The limitation does not apply to educational establishments. The provision was also modified so as to add that copies may be made for investigation and preservation purposes.

#### **V. *Broadcasters***

The Act does not contain an exception on ephemeral copying as such. Broadcasters may, include an incorporation of a work in a program beamed to satellite. This is part of a statutory right which requires prior authorization by the right holder and forms part of a general communication to the public (by broadcast or satellite transmission) license.

#### **VI. *Teaching and Scientific Research***

Limitations for the purpose of teaching were introduced in a new Article 32 (1) Copyright Act, which expanded the previously existing narrow exceptions relating to teaching and scientific research. The Act previously permitted the quoting and summarizing of works for teaching and research purposes. This was additionally limited to fragments of works which may be included in one's own work.

Article 32 Copyright Act now deals with various types of permitted uses for educational purposes, including the inclusion of works for educational and research purposes, the reproduction of works carried out by teaching staff and the making available in closed networks in accordance with Article 5 (3) (n) EUCD.

The provision, in Article 32 (1) Copyright Act now permits the making of copies and the loan works for inclusion (i.e. quotation) from fragments of literary works, audio visual works and sound recordings as well as the inclusion of artistic works such as photographs and works of fine art. The work must have been published or otherwise disclosed to the public. The inclusion into other works must be strictly made for

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<sup>288</sup> Court of First Instance Barcelona, 2 January 2002 - SGAE v Traxdata.

<sup>289</sup> XXVIC, p. 425ff.

purposes of analysis or commentary and only for educational and research aims. The source must be indicated. The same applies to the making of periodic compilations by way of reproduction, save where this is done with a commercial aim. In the case of works of a journalistic nature, a right to equitable remuneration is foreseen. In addition, authors of press articles may expressly object against any such inclusion, in which case Article 34 (1) Copyright Act is inapplicable.

According to Article 37 (2), teaching staff are permitted to reproduce, distribute and communicate to the public small fragments of published works or individual artistic works. This excludes textbooks and manuals created for educational purposes. The limitations only applies, in accordance with Article 5 (3) (a) EUCD, for purposes of illustration of teaching in classrooms. The activity must be justified by its non-commercial purpose and, where possible, the author's name must be indicated. The provision does not extend to entire compilations of works or certain arrangements of artistic works.

## **VII. *Disabled People***

Article 31<sup>bis</sup> (2) Copyright Act now permits the making of copies for the private use of disabled. This is entirely in line with Article 5 (3) (b) EUCD. The previous exception only related to the transformation of literary works into Braille script.

## **VIII. *Current Economic, Political or Religious Topics***

The Act provides certain exceptions related to uses in the media, and these will be left intact. There is no copyright protection for factual news (Article 13 Copyright Act) and the respective limitations only apply in relation to works of a copyright character. These were not updated as far as uses by the press are concerned, though specific provisions dealing with the use of press articles exist for educational purposes. This remains unchanged.

The most important limitations for press purposes is to be found in Article 33 Copyright Act, which permits the use of articles on "topical subjects" by dissemination through mass communication media of studies and articles. The use covers the reproduction, distribution and communication to the public of such articles. The source must be acknowledged if the work had been published including the author's name.

There are restraints to the limitation. First – and in line with Article 5 (3) (c) EUCD – the author of a (copyrightable) news article may reserve his rights, in which case the limitation does not apply. Secondly, Article 33 (1) Copyright Act provides that dissemination may only take place in any other medium of the same type (i.e. mass communication).

Following the implementation of Article 3 EUCD, Article 33 (1) will automatically encompass the online limb of the communication to the public right under Article 20 (2) (i) Copyright Act.

Literary works of a creative character are excluded.

#### **IX.** *Quotations*

The law incorporates a limitation under Article 32, which permits the inclusion of parts of a work into literary work, an aural or audio-visual work; in addition, the use of certain individual artistic works is covered, and provided the use is made for purposes of criticism, commentary or analysis, for educational aims or for scientific purposes. The use is only permitted to the extent justified by the purpose and the author's name and source must be acknowledged.

#### **X.** *Public Security*

Article 31bis (1) permits the reproduction of works for use in judicial and administrative proceedings. This was changed and now reflects the wording of Article 5 (3) (e) EUCD.

#### **XI.** *Speeches, Public Lectures etc.*

Speeches, pleas in court, public addresses and related public presentations may be reproduced for purposes of information under Article 33 (2) Copyright Act. The provision systematically deals with limitations for the media and is subject to the speaker intending to use the speech etc. for his own collection.

#### **XII.** *Religious or Official Celebrations*

Article 38 already allows the performance of musical works for a number of occasions including state events and events organized by the church. The provision will be left intact.

#### **XIII.** *Incidental Inclusion*

Article 34 permits the dissemination of any work "capable of being seen or heard in connection with news reporting" to be freely disseminated. The limitation is restricted to the purpose of reporting.

#### **XIV.** *Caricature and Parody*

Parodies are per se not subject to copyright infringement in that such novel uses are not considered as an infringing reproduction. Article 39 provides that caricatures, parodies, pastiches and the like are not to be considered as derivative works. However, the author of the source work may object on the basis that the use in question causes confusion. No amendments have been made.

#### **XV.** *Artistic Works*

Article 35 allows the reproduction by way of drawing, photography and other audiovisual means of works permanently located in public places and in "public view". Again, no amendments are foreseen

## **XVI. *Research or Private Study***

Article 5 (3) (n) was implemented in a new Article 37 (3) Copyright Act, which permits the communication to the public to designated individual persons for purposes of research. It only pertains to works held in a collection of the establishment and only allows the communication to the public in closed networks available on the establishment's premises. In addition, it only applies with respect to educational establishments mentioned in Articles 37 (1) and (2) Copyright Act<sup>290</sup>.

Importantly, as permitted according to Recital 38, authors have an additional claim for equitable remuneration.

## **C. Compensation System**

The Spanish system is based upon levies to be paid for both blank carriers and copying devices. Levies are payable by manufacturers and importers of any such equipment, but resellers and distributors are jointly liable unless they can prove that the amount has been paid to the producer. The scheme does not apply to the copying of software, copies made for commercial purposes and collective purposes, and is thus restricted to any form of private copying. As noted, the current scheme was controversially debated in relation to the making of unlawful copies (i.e. from file sharing networks) and the issue has not been resolved. The levy scheme applies to authors, performers, publishers and sound and video recording producers, and Article 25 details respective shares according to specific types of private reproductions.

Specific novel regulations were inserted concerning copies made for private purposes by way of digital technology. Digital reproductions are subject to future negotiations between collecting societies and right owner's organisation. In case of disagreement, the tariffs may be set by the Ministries of Culture and Industry and Tourism and Commerce according to a detailed time schedule. That scheme pertains to both digital supports (such as CD's, DVD's and other carriers) as well as equipment and copying devices. The amount payable is referred to as equitable remuneration. The procedure will, in addition to mediating between the parties, also determine the types of carriers and copying devices the levy will apply to. The application of technological protection measures must be taken into account in setting the tariffs as well as the respective division of analogue and digital copying modalities. The ministerial order will take into account, in addition, the actual damage caused, the degree of use of equipment and carriers, the capacity of storing devices, the quality of copies and the time such copies were made

The amounts will then be distributed according to the final average price payable by the end consumer.

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<sup>290</sup> See above, XXVIB.VI, p. 422.

The definition of copying devices, importantly, extends to computer hard disks.

## **D. Technological Protection Measures**

Technological protection measures were already protected as regards the manufacture and importation of circumvention tools. Under Article 240 of the Criminal Act, criminal sanctions for the importation or manufacture of instruments specially intended to allow the unauthorized removal or circumvention of technological protection measures apply under Article 240 of the Criminal Code.

The implementation has now introduced Articles 6 and 7 EUCD faithfully in Articles 160 - 162 Copyright Act. A new title V was created in Book III of the Copyright Act. The provisions were systemically allocated to the norms concerning infringement of copyright and related rights.

Computer programs are excluded from Articles 160 – 162 Copyright Act.

### **I. *Acts of Circumvention***

Article 6 (1) was implemented in a new Article 160 Copyright Act. The provision is very near to Article 6 (1) EUCD. It only sanctions acts of circumvention if done wilfully, i.e. the person committing the act must know or have reasonable ground to know that he or she is pursuing that objective. The term “objective” is not defined, though from the text it is clear that technological protection measures may be circumvented in cases where copyright does not subsist.

If a user circumvents, the objective, under the current wording relates to the act of circumventing as such rather than to an act of subsequent copyright infringement, though it may be surmised that such wilfulness must be related to copyright infringement. However, the rather strict adherence to Article 6 (1) EUCD implies that both the intention and the knowledge of a person circumventing technological protection measures must relate to that act, rather than any subsequent act infringing copyright. Thereby, circumvention will constitute an infringement of the application of technological protection measures but will not infringe any rights if the technological protection measures have been applied to non-copyrightable subject matter.

The prohibition on circumvention applies to effective technological protection measures which includes both access and use restrictions. Measures are understood as effective if they prevent or restrict acts relating to works and neighbouring rights by using access and use control technologies if controlled by the beneficiary of protection.

### **II. *Commercial Dealings***

Article 6 (2) EUCD was implemented in a new Article 160 (2) Copyright Act, defined broadly as a preparatory act.

In contrast to the Directive, the proposed bill plans to exclude any element of intention. The prohibition will thus prohibit any manufacture, importation, advertisement for and provision of services, as is promulgated under Article 6 (2) EUCD, which is designed to enable or facilitate the circumvention of technological protection measures. That purpose is entirely unrelated to copyright infringement, irrespective of whether it enables a subsequently infringing use or not, or whether it is to be applied to non-copyrightable subject matter. The Spanish Act, at least as the present status of the bill is concerned, thereby goes beyond Article 6 (2) EUCD by disconnecting the prohibition on circumvention, as applied to works protected by copyright, from its preparatory act. This may cause a reversal of legal principles since the preparatory is wider than the principal act to which it refers. Consequentially, the prohibition on commercial dealings will arguably transform Article 6 (2) EUCD into a principal tort which itself is open for further acts of a preparatory or contributory nature. This is supported by the continued stand alone application of the prohibition under the Criminal Code.

### **III. *Limitations and Technological Protection Measures***

Article 161 Copyright Act deals with the problem of balancing the interests of right owners and limitations as far as technological protection measures are concerned. The Spanish solution is primarily based upon voluntary measures to be implemented by right holders. If such measures are absent, users may immediately revert to litigation before the civil courts. The right holder must facilitate access to works as is necessary for beneficiaries to enjoy the limitations. The restrictions relating to online services under Article 6 (4) (4) EUCD applies.

The limitations include private copying, the limitation for public security and official procedures and on behalf of disabled people (Article 31 Copyright Act), illustration for teaching (Article 32 (2) Copyright Act), the limitation for libraries, museums and archives (Article 37 (1) Copyright Act) and the pre-existing limitation for the benefit of broadcasters (Article 36 (3) (f) Copyright Act).

Interestingly, the Spanish implementation also extends the enforceability of limitations to database right owners. This includes the specific copyright limitations under the Database Directive for purposes of illustration of teaching or scientific research (Article 34 (2) (b) and Article 34 (2) (c) Copyright Act). The obligation to provide access means also applies with respect to the substantial extraction and re-utilisation of databases protected by the sui generis right (Article 135 (1) (b) and (c) Copyright Act) for purposes of illustration of teaching, scientific research and public security and judicial procedures.

Beneficiaries must have legal access to the works in question. They are given a positive right to enforce the availability of limitations. This refers to all beneficiaries covered under Article 6 (4) (4) EUCD.

In relation to private copies, the right holder may establish a maximum number of copies to be made by the user, and this may then be enforced via the application of

technological protection measures. Under the initial bill, it was predicated that only three copies should be allowed though this is now being debated.

## **E. Rights Management Information**

The provisions on rights management information was implemented in Article 162 Copyright Act which follows the language of Article 7 EUCD closely. As with technological protection measures, the removal or alteration of rights management information carries a criminal sanction under Article 240 of the Criminal Code.

## **F. Sanctions**

The sanctions applicable to technological protection measures and rights management information follow those imposed under general law. The specific criminal prohibition has already been mentioned. Article 138 now also includes provisions derived from the Enforcement Directive. The provisions apply to violations of Article 160 and 162 Copyright Act.

In addition, Article 138 was reorganised and now includes provisions on relief sought against infringing acts, which includes a claim for the ceasing of such activities applicable to intermediaries. In accordance with Article 8 (3) EUCD, intermediaries may be asked to take down infringing material. The Act makes it clear that liability in damages etc. is governed by Law 34/2002 on Electronic Commerce. Therefore, issues of liability are subject to whether intermediaries themselves provide infringing material, in which case the provisions on copyright liability are fully applicable, or whether intermediaries merely host or cache material. However, in case liability is incurred in accordance with Articles 12-14 of the Electronic Commerce Directive, the Copyright Act provides that the general copyright liability rules apply.

## **G. Conclusion**

There were minimal changes to the existing system. There are, however, a number of issues that need clarification, in particular as regards the concept of private copying and the effects upon the remuneration system with respect to digital copies. In comparison with other member states, the Spanish implementation places considerably more emphasis on levies.



## XXVII SWEDEN

The Swedish transposition was completed on July 1<sup>st</sup> 2005. The Directive was implemented in Sweden by amendments to the ACT 1960:729 ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS of December 30, 1960 (the Copyright Act), which entered into force on July 1, 2005. The Directive passed without a lively political debate. However, in academia, newspapers, and on the Internet the debate was vigorous, especially regarding technical measures (open source v. right holders). The provisions of the Directive had to be implemented in the Swedish Copyright Act before they could take effect. The Ministry of Justice analysed and evaluated the matter in question and the Ministry's conclusions and draft of amendments to the Copyright Act were published in the Swedish Ministry publications series no 2003:35. Since the proposed amendments to the Copyright Act had important implications for private citizens the proposal was referred to the Council on Legislation at January 20, 2005 to ensure that it did not conflict with existing legislation. After this, at March 10, the Ministry of Justice drafted the final amendments to the Copyright Act and submitted the Government Bill no 2004/2005:110 to the Parliament. After its successful passage through the Parliament, the amended Copyright Act was formally promulgated by the Government.

### A. Exclusive rights

#### I. *Reproduction Right*

The beneficiaries of that right are Authors (Article 1 of the Copyright Act); performing artists (Article 45 of the Copyright Act); producers of recordings of sounds or of moving images (Article 46 of the Copyright Act) and sound radio or television organizations (Article 48 of the Copyright Act).

Prior to the implementation of the Directive it was uncertain if temporary or ephemeral copies in, for example, a computer memory was a part of the author's economic rights and if it could be a copyright infringement. In this respect, Article 2 of the Copyright Act was changed. From the provision follows that the making of copies shall be considered any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part

#### II. *Communication to the Public*

Making a work available to the public in such a way that different people may access the work from a place and at a time that they determine themselves is typically what happens when works are accessed on demand over the Internet. Before the implementation of the Directive, such acts was not recognized expressly, and it was uncertain if it was an act of communication to the public. Further on, case law recognized that music on the Internet should be described as public performance (see the Swedish Supreme Court of

June 15, 2000). Since the implementation of the Directive follows from Article 2 of the Copyright Act that right of public communications among other things includes works transmitted over the Internet.

### **III. *Distribution Right***

A distribution right was in existence in the Copyright Act before the Directive, and was not amended. From Article 19 of the Copyright Act follows that the distribution right for certain types of works is limited in the sense, for instance, that copies that have been transferred by the author or with his/her consent within the European Economic Area may be further transferred freely. The rental right, however, still remains. If on the other hand the copy has been transferred outside the Area, the distribution right still applies, which for instance means that so-called parallel import from the United States is not allowed without the consent of the rights holder

## **B. Exceptions and Limitations**

The Swedish Copyright Act contains a number of limitations, which means that a work may be used in certain specified situations and under certain conditions despite copyright protection. Nevertheless, when a work may be used freely in accordance with these provisions, the moral rights of the author must be observed.

The three-step test (Article 5 (5) EUCD) has not been implemented. It has not been previously recognised in Sweden, either in statute or judicature.

### **I. *Transient Copies***

Article 5 (1) of the Directive has been implemented in the Copyright Act and been formulated as a limitation. From Article 11 (a) of the Copyright Act follows that temporary forms of copies of works may be made, if the making of the copies is an integral and essential part of a technological process and if the copies are transient or have only a secondary importance in that process. The copies must not have any independent economic importance. Furthermore, the making of copies is permissible only if the sole purpose of that making is to enable a transmission in a network between third parties by an intermediary, or a lawful use, that is, a use that occurs with the consent of the author or his successor in title or another use that is not un-permissible under the Copyright Act.

### **II. *Reprography***

Limitations for reproductions on paper or any similar medium did not exist under Swedish copyright law and have not been implemented.

### **III. *Private Copying***

The Copyright Act contained, prior to the implementation of the Directive, a limitation on private copying. However, private copying was not subject to a levy. This has not changed since the implementation.

Before the implementation of Article 5 (2) (b), a free and extensive exception on the making of copies for private purposes – meaning for personal use – existed in the Copyright Act. Since the implementation, the exception is narrower.

Now, Article 12 of the Copyright Act principally states that anyone is allowed to make one or a few copies of a work for himself/herself, for the family and for friends. In addition, in certain cases it is not permitted to have someone else do the copying. The master copy that is used must be legal, i.e. it must not be a pirated copy or a copy of a work that has been posted on the Internet without permission. Further on, it is not permitted to remove a copy protection lock on a CD or a DVD, even if this is done for making a private copy.

However, it is in principle no longer permitted to copy entire books. This also applies to educational literature. It is still permitted to copy limited parts of a literary work, for instance some chapters of a book, or a literary work of limited scope, such as a poem or a short story.

This limitation does not apply to computer programs nor does it apply to the copying of compilations (databases) in digital form.

### **IV. *Libraries, museums and archives***

In libraries, archives and schools it is often necessary to copy and distribute material on a large scale to many people. In these areas, and others, there is a system of extended collective licenses which makes it unnecessary to obtain consent from each individual author, thereby facilitating such copying/distribution. This means, for example, that a school may conclude an agreement on the use of works with an organization that represents a substantial number of authors in the field concerned. In this way the right to use works of authors who are not represented by the organization is also obtained.

This limitation already existed before the Copyright Act was amended and the Directive does not prompt the amendments, but the Directive gives the limit for the amendments.

### **V. *Broadcasters***

Article 5 (2) (d) (Ephemeral Recordings by Broadcasters) has not been implemented since related questions had to be analysed. However, from Article 26 (e) of the Copyright Act follows that a sound radio or television organisation which has acquired the right to broadcast a work is also entitled to record the work on a material support from which it can be perceived, if this act is made for use in its own broadcasts on a few occasions during a limited time, to ensure evidence concerning the content of the

broadcast, or in order to make it possible for a governmental authority to exercise supervision over the broadcasting activities. Recordings may be used only for these indicated purposes. Such recordings which have a documentary value may, however, be preserved in the National Archive for Recorded Sound and Moving Images.

Further on, Article 4 of the Copyright Regulation (1993:1212) states that when a radio or television organisation makes a recording under Article 26 (e) of the Copyright Act, or a provision which refers to that provision, the recording shall be made by means of the organisation's own facilities, may be used only for the organisation's own broadcasts a few times during a limited period, after which the recording shall be erased, if not may be transferred to a new material support, in which case the original recording shall be erased, and may be used for the preparation of a special copy of the recording which may then be used for a broadcast; after the broadcast the recording on the special copy shall be erased.

## **VI. *Teaching and Scientific Research***

Article 18 of the Copyright Act has been amended to compile with Article 5(3)(a). Article 18 states that anyone who, for use in educational activities, prepares a composite work consisting of works by a comparative large number of authors may reproduce minor portions of literary or musical works and such works of a limited scope, provided that five years have elapsed from the year in which the works were published. Works of fine art may be reproduced in connection with the text, provided that five years have elapsed from the year when they were made public. However, this does not apply to works that have been created for use in educational activities and does not confer a right to prepare composite works for commercial purposes.

The authors have a right to remuneration and the source should be named.

Further on, a provision previously existed that works of fine art which have been made public may be reproduced in connection with the text in a scientific presentation (Article 23 of the Copyright Act). The source should be named. However, the provision has been limited since it nowadays only concerns a presentation which has not been prepared for commercial purposes.

## **VII. *Disabled People***

This limitation existed before the implementation of the Directive (Article 17 of the Copyright Act). Nevertheless, the right to make special copies for people with disabilities has been adapted to the new technological opportunities that exist today.

It is now possible for anyone to make digital copies of literary works, books, newspapers, etc. for use in synthetic speech or Braille displays. The right to make copies does not, however, apply to sound recordings - talking books. Only libraries or organizations with special permission from the Government are allowed to produce talking books freely.

Libraries and organizations may also be given permission to communicate copies of works through a network directly to people with disabilities. Also, libraries and organizations may be given permission to make copies of radio or TV broadcasts and copies of films for people who are deaf or hearing-impaired.

The author has a right to remuneration and the source should be named.

#### **VIII.** *Current economic, Political or Religious Topics*

A limitation for the press existed prior to the amendments of the Copyright Act (Article 23). Works of fine art which have been made public may be reproduced in a newspaper and a periodical in connection with a report on a current news event, except if the work has been created for reproduction in such a publication. This applies only if the use of the reproduction is carried out in conformity with proper usage and to the extent called for by the information purpose.

The author has a right to remuneration and the source should be named.

#### **IX.** *Quotations*

This limitation already existed and has not been modified. Article 22 of the Copyright Act determines that anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public. The source should always be named.

#### **X.** *Public Security*

This limitation existed before the implementation. Anyone is entitled to use oral or written statements before public authorities or in government or municipal representative bodies. This follows from Article 26 of the Copyright Act.

#### **XI.** *Speeches, Public Lectures etc.*

This limitation already existed. Anyone is entitled to use oral or written statements in public debates on public matters and at public questionings on such matters. This also follows from Article 26 of the Copyright Act.

#### **XII.** *Religious or Official Celebrations*

This limitation already existed. Article 21 of the Copyright Act settles that anyone is entitled to publicly perform works, with the exception of cinematographic works and works made for the stage, that have been made public in the course of divine services.

#### **XIII.** *Architectural Works etc.*

This limitation existed before the implementation. From Article 24 follows that works of fine art may be reproduced in pictorial form if they are permanently located outdoors

on, or at, a public place. However, the author has a right to economic compensation. Buildings may be freely reproduced in pictorial form.

#### **XIV.** *Incidental Inclusion*

A new provision was amended on works of fine art included in a film, a television program or a picture. Article 20 (a) of the Copyright Act states that anyone is entitled to prepare, by means of a film or a television program, and distribute, copies of works of fine art, publicly perform works of fine art and communicate works of fine art to the public, if the exploitation made of the work is of minor importance in relation to the contents of the film or the television program. Corresponding acts of exploitation may also be carried out of works of fine art that appear in the background, or otherwise form an insignificant part, of a picture. A narrower limitations was in place prior to the implementation.

#### **XV.** *Advertising for Public Exhibitions etc.*

This limitation already existed, but has been modified to comply with the Directive. From Article 24 of the Copyright Act it follows that works of fine art may be reproduced in pictorial form if the purpose is to advertise an exhibition or a sale of the works of fine art but only to the extent necessary for the promotion of the exhibition or the sale or if they form part of a collection, in catalogues, however not in digital form.

#### **XVI.** *Caricature and Parody*

To use a copyrighted work for the purpose of caricature, parody or pastiche is not regulated in the Swedish Copyright Act. However, general principles of law, settled in case law, recognize that such a use is not a copyright infringement.

The most recent case regarding this issue is a decision of the Swedish Supreme Court of December 23, 2005 (the use of a children book character). The Court found that a radio program using the children books character was a parody and should be considered an *independent* work of Article In view hereof the radio program was not considered a violation of the authors' literary or artistic reputation or individuality.

#### **XVII.** *Artistic Works*

This limitation already existed, but is narrower than Article 5 (3) (m) of the Directive. From Article 24 of the Copyright Act it follows that buildings may be freely reproduced in pictorial form.

#### **XVIII.** *Research or Private Study*

This limitation was not implemented. The legislators' opinion was that amendments to Article 21 of the Copyright Act were sufficient. From the provision follows that anyone is entitled to publicly perform works, with the exception of cinematographic works and works made for the stage, that have been made public in the course of educational

activities or divine services. This does not confer a right to publicly perform, for commercial purposes, compilations in the course of educational activities.

#### **XXI.** *Uses of 'minor importance'*

Article 23 (3) of the Copyright Act regarding the use of works of fine arts in connection with the text in a critical presentation had to be changed to fall within the scope of Article 5 (3) (o) of the Directive. Today the provision is limited to concern analogue use and not in a digital form.

Further on, Article 24 (3) of the Copyright Act was modified and from the provision follows that works of fine art may be reproduced in pictorial form if they form part of a collection, in catalogues, however not in digital form. Before the implementation of the Directive such a limitation existed regarding both analogues and digital uses.

### **C. Compensation System**

In connection with the provisions on limitations, there are certain types of remuneration systems. The law contains, for instance, provisions on what are generally referred to as *levies on blank media*. This means a levy on blank cassettes or other media on which copies can be made for private purposes. The remuneration differs depending on whether the media are analogue or digital and whether the digital material can be used for recording only once or several times. This remuneration is intended to compensate authors, performing artists and producers of music recordings for the extensive copying of their works, performances and productions that takes place.

### **D. Protection of Technological Measures**

A new provision was added to the Copyright Act. From Article 52 (d) of the Copyright Act it follows that it is prohibited to circumvent, without the consent of the author any digital or analogue lock which prevents or limits the making of copies of a work protected by copyright, to circumvent a technological process, such as encryption, that prevents or limits the communication to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of communication. However, this does not apply if someone is in legal possession of a copy of a protected work, e.g. a CD or a DVD, and circumvents the technological protection only to be able to watch or listen to the work.

#### **I.** *'Effective' technological measures*

The term 'effective technological measures' is not defined under Swedish copyright law.

## **II. *Acts of Circumvention***

From Article 52 (d) of the Copyright Act it follows that it is prohibited to circumvent, without the consent of the author, any digital or analogue lock which prevents or limits the making of copies of a work protected by copyright, to circumvent a technological process, such as encryption, that prevents or limits the communication to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of communication.

## **III. *Acts of dealing with Circumvention devices***

From Article 52 (e) it follows that it is prohibited to manufacture, import, transfer, distribute by, for instance, sale or rental, or to possess for commercial purposes any devices, products or components, or to make available services, which are put on the market or advertised for the purpose of circumvention of a technological measure, other than to circumvent a technological measure, have only a limited interest from a commercial point of view, or a limited scope of commercial use, or are primarily designed, constructed, adapted or produced for the purpose of enabling or facilitating a circumvention of a technological measure.

## **IV. *Limitations and beneficiaries of limitations and technological protection measures (Article 6 (4))***

From Article 52 (f) of the Copyright Act it follows that, if an encryption or other technological measure could prevent access to a work that someone would like to use – for instance for the making of copies under a limitation provided for in copyright law – and the rights holder does not make available a copy where the protection measure has been removed, it is possible to request a court to order the rights holder to do so, under penalty of a fine. This applies for example if the protected copy is intended to be the master for copying in archives or libraries or for the making of copies for people with disabilities; it also applies in order to enable access to public documents. However, this possibility to take a matter to court does not apply when someone wants to make a copy for private purposes.

The majority of referral bodies – that is central government agencies, special interest groups, local government authorities or other bodies whose activities may be affected by the legislative proposal – have been positive to the proposal or left it without any comments. However, Swedish Television is of the opinion that users should have a right under special conditions to circumvent technological measures. Further on, Stockholm University is of the opinion that penalty of a fine is not an efficient sanction.

There are no indications under Swedish copyright law that the application of technological protection measures might violate general contract and/or consumer law provisions, i.e. that a technological anti-copying device be deemed as illegitimate if it curtails the rights of a purchaser under contract law.



## **E. Rights Management Information**

The Copyright Act contains in Article 52 (g) a prohibition against the removal or manipulation of electronic information on the management of rights which is included in or attached to a work, for instance information or codes that aim to provide information about who owns the rights to the work and how to obtain authorization to use the work. The prohibition also applies to the distribution of works from which such information has been removed.

## **F. Sanctions**

### **I.** *New amendments to the law on remedies for copyright infringement*

A new provision has been amended to the Copyright Act. From Article 57 (b) follows that anyone who wilfully and knowingly or with gross negligence violates the right regarding technological measures or electronic information on the management of rights, shall be punished by fines or imprisonment for not more than six months. As regards technological measures public prosecutor may, however, file a criminal action only if such an action is called for in the public interest. Nevertheless, providing facilities or tools for such circumvention (as well as violations of the provisions on the protection of electronic information on the management of rights), a public prosecutor in this case may file a criminal action not only if it is necessary in the public interest but also if a complaint has been received from the person who has been damaged by the violation.

### **II.** *Other civil and criminal sanctions for copyright infringement*

Infringements that occur wilfully (i.e. intentionally) or through gross negligence may entail penalties in the form of fines or imprisonment for at most two years. The offence is subject to public prosecution, but for a public prosecutor to be able to initiate a criminal action the author or his/her successor in title must have filed a complaint or, alternatively, the prosecutor has to consider that action was called for in the public interest, e.g. to deter pirate copying of copyright-protected material. Especially in cases of piracy of music and films, penalties in the form of imprisonment or heavy fines may be imposed and considerable damages may be awarded. There are certain exceptions from these criminal sanctions, for instance in some cases of copying computer programs for private purposes, which is in fact illegal but not punishable.

An author or other rights holder may request an injunction prohibiting an infringer from continuing his or her action on penalty of a fine. Under certain conditions such an injunction may be ordered without hearing the opposite party.

Special provisions apply to the securing of evidence in infringement cases. If it can reasonably be assumed that someone has committed an infringement or some other violation, a court may order that an investigation (infringement investigation) be conducted at his or her home to secure evidence. Under certain conditions such an order may also be issued without the suspect having been informed beforehand.

Infringement of rights under copyright law may also give rise to damages. Firstly, the person who has committed such an infringement has to pay what amounts to reasonable compensation for the exploitation that has taken place. Secondly, if the infringement has taken place through negligence or intentionally, compensation must also be paid for other damage that may have occurred (e.g. loss of market shares, personal suffering, etc.) If, however, a person has violated the provision that copying for private purposes may take place only from a legal master copy, he/she need only pay compensation if the act has been carried out intentionally or through gross negligence, but not otherwise. Furthermore, the court may order that anyone who has made copies in violation of the law must surrender them to the rights holder in return for compensation. The same applies, for instance, to type matter, printing blocks, etc. that can only be used for the production of illegal material. Alternatively, the court can decide that the material must be destroyed or that other measures must be taken to prevent further wrongful use.

### **III.** *The position on liability of intermediaries*

The general rule is that anyone, also intermediaries, who wilfully and knowingly or with gross negligence violates the rights following from the Copyright Act, shall be punished by fines or imprisonment. However, from Article 11 of the Copyright Act follows that the making of temporary copies is permissible only if the sole purpose of that making is to enable transmission in a network between third parties by an intermediary.

## **G. Conclusion**

There is a certain amount of disparity between Swedish copyright law and the Directive.

Article 24 (1) of the Copyright Act, which states that works of fine art may be reproduced in pictorial form if they are permanently located outdoors on a public place, falls within the scope of Article 5 (3) (h) of the Directive. Nevertheless, the Swedish legislation is narrower and the provision conflicts with Article 5 (5) of the Directive.

The Swedish implementation of Article 5 (2) (b) goes further than the Directive. Since the implementation, Article 12 of the Copyright Act principally states that anyone is allowed to make *one* or a *few* copies of a work for private use, for the family and for his or her friends – a use that can in no way be regarded as commercial. It is, however, only possible to copy limited parts of a protected work or works that are small in scope, e.g. a poem or a short story. Naturally, what constitutes a limited part of a work can vary and must be decided on a case-by-case basis. Under the Copyright Act it is not permitted to make an unlimited number of copies but, rather, only one or a few copies, and such limitation does not exist in the Directive. However, see this in the light of the three-step test (Article 5 (5) of the Directive), which is not implemented. Further on, copying for private use do not make an distinction between analogous and digital copying.

As regards private copying the author has not a direct right to remuneration under the Copyright Act, which the right holder is entitled to in the Directive. Nevertheless, in connection to this limitation, some right holders will receive indirect remuneration. The Copyright Act contains provisions on levy on blank cassettes or other media on which copies can be made for private purposes. The remuneration differs depending on whether the media are analogue or digital and whether the digital material can be used for recording only once or several times. This remuneration is intended to compensate authors, performing artists and producers of music recordings for the extensive copying of their works, performances and productions that takes place.

General economic and technological development is closely linked to the development of copyright law. New information technology, in particular digital technology, has in recent years had a considerable influence on copyright and the legislators in various countries, supported by the European Community, have tried to adapt their laws to the demands of new technology. In the European Community no less than seven directives have been adopted to regulate different aspects of the copyright system in the new situation. These directives cover: the protection of computer programs; rental, lending and neighbouring rights; the term of protection; satellite and cable transmissions; databases; copyright in the information society; and resale rights. Further on, another factor that has had considerable impact on national copyright law is international trade policy, which is mainly reflected in the TRIPS Agreement within the World Trade Organisation. One of the important effects of the Agreement is that a violation of the provisions in respect of copyright may, for instance, result in trade sanctions. Piracy, i.e. unauthorized copying of protected works and productions on a commercial scale, is a significant problem in Sweden, as in many other countries, mainly because new technology makes it easier and less expensive to copy music, videos, computer programs, books, etc. For this reason, many countries have increased the penalty for such piracy and have provided customs authorities with greater powers to take action against the import of pirated material. Nevertheless, that the legislator is influenced so much of technology can be considered strange in the copyright field.

## XXVIII UNITED KINGDOM

The implementation process in the United Kingdom was concluded in 2003. The Directive was transposed into the Copyright, Designs and Patents Acts 1988 by Statutory Instrument SI 2003/2498 (“The Copyright and Related Rights Regulations 2003”). Minor amendments were made under the Performances (Moral Rights etc.) Regulations 2006 (SI 2006/18). The Regulations entered into force on 31 October 2003.

The implementation was accompanied by an extensive consultation process conducted by the Patent Office and concluded on 31 October 2002. The first draft proposal was presented in 2002, and subsequently amended in a number of important concerns.

### **A. Exclusive Rights**

The CDPA 1988 contains an extensive list of “restricted acts” in relation to copyright. The term copyright encompasses both traditional types of works (literary, artistic, dramatic and musical works) as well as rights in sound recordings, broadcasts, films and typographical arrangements. Performers’ rights are dealt with under a separate chapter. In contrast to the continental systems, a work is protected once it falls within one of the categories and a minimum of skill, labour and judgment is present.

The CDPA distinguishes between primary and secondary infringement. Primary infringement concerns the usual exclusive rights of reproduction, distribution and communication to the public. The rights are enumerated in the umbrella clause under Sec. 16 CDPA and specified in subsequent paragraphs.

Performers Rights are dealt with under Secs. 181 ff. CDPA, especially Secs. 182A-182D CDPA 1988. Performers’ rights are classified as rights to consent but constitute property right in relation to primary acts of infringement. The right of performers is vested in a recording of a performance rather than the performance as such.

#### **I. *Reproduction Right***

Sec. 17 CDPA contains a detailed reproduction right which was left unaffected by the implementation. The CDPA has, for a long time, restricted transient copies made in computer memory (Sec. 17 (6) CDPA). In general, a reproduction is made once at least a substantial part has been copied, Sec. 17 (1) CDPA. It was felt that an amendment was unnecessary since Sec. 17 (1) CDPA implicitly encompasses copying by any means or form and the “substantial part” requirement would implicitly cover partial copies.

Performers have, in implementing Article 2 EUCD, been given a slightly different version of the reproduction. According to a new Sec. 182A CDPA, copying includes the

making of a copy which is transient or is incidental to some other use of the recording. The provision does not relate to a substantial parts test which indicates that the taking of a small portion from a recording does not infringe performers' rights. It might, however, infringe any copyright in a musical or literary work contained therein.

## **II. *Communication to the Public***

The right of communication to the public, including the making available, has been inserted in Sec. 20 CDPA as amended.

Sec. 20 previously dealt with the right to include a work in a broadcast or cable programme service. The first proposal envisaged a distinction between on demand services and broadcasts, which was later modified so as to formulate the making available right as the right to making available to the public by electronic transmission in such a way that members of the public may access it from a place and a time individually chosen by them.

Whereas this complies with Article 3, the implementation leaves open whether the copyright owner is granted a distinct right of communication to the public by wire or wireless means. The draft proposal was based on a definition referring to interactive on-demand services to be covered by the making available right. Following requests from right holders asking to extend the right to any communication, Sec. 20 CDPA was slightly amended.

Sec. 20 CDPA now comprises both a broadcasting and a distinct making available right afforded to authors, film producers, broadcasters, performers and makers of sound recordings. Both rights come under a general heading of a public communication right by electronic transmission. The definition of broadcasting was modified in Sec. 6 CDPA, which concerns copyright protection for broadcasts, and a clarification was inserted stating that cable re-transmission constitutes a separate act. Accordingly, broadcasts are now defined as including both wireless and cable transmissions of a broadcast character. This pertains to situations in which the interactive element is absent, and the Act specifically excludes Internet transmissions.

Electronic broadcast, under Sec. 20 CDPA, is now restricted to simultaneous transmission (on the Internet and by other means such as streaming), the concurrent transmission of live events and a transmission of recorded moving images or sounds forming part of a service which offers programmes at a scheduled time determined by the service provider.

The background to the distinction is the previous uncertainty surrounding the explicit copyright protection for cable programme services, which gave protection to any data included in another cable programme. Thereby, the use of works on a web page (a cable programme service) constituted an inclusion of items *in* a cable program under Secs. 7 and 20 CDPA prior to its amendment. This resulted in an extremely broad right to prohibit any electronic transmission of any information and data irrespective of whether

the items were protectable by copyright or not<sup>291</sup>. This has now been repealed with the effect that such protection can no longer be afforded to typical Internet transmissions, a situation which still exists in Ireland.

However, although the definition of broadcasts and the removal of cable programme copyright seems sufficiently clear to allow proper distinctions between specific services similar to broadcasts and a more general right of making available, there are unresolved issues since a general communication is not provided for. The interplay between Secs. 6 and 20, as regards the status of broadcaster's as right owners, results essentially in the grant of an extensive web-casting right vested in broadcasting organisations. This will cause conflicts in relation to the envisaged WIPO Broadcasting Treaties where web casting has now been struck off.

Performers are granted an exclusive right of making available under a new Sec. 182 CDPA. The right is limited to making available to the public a recording of a performance.

### **III. Distribution Right**

The distribution right, termed as the right to issue copies to the public, is contained in Sec. 18 CDPA. Sec. 18 (3) CDPA refers to the exhaustion principle by stating that copies which have been issued to the public for the first with or by the owner's consent can be freely circulated. Article 3 (3) EUCD has not been implemented since the traditional interpretation already concerned only the distribution of tangible copies.

As with Ireland, there are uncertainties as to when the right is, in accordance with European law, exhausted. This is because the CDPA draws a distinction between acts of primary and secondary infringement. Secondary acts of infringement relate to the acts such import and dissemination of infringing copies. An infringing copy is one which is not exempt under Sec. 18 (3) CDPA. The tendency under earlier case law was to allow exhaustion only at the final stage, the effect being that an importer or other dealer was liable for secondary copyright infringement. Conversely, some leading works have taken the view that the first act of lawful disposition exhausts the right in order to escape the secondary liability consequences. The issue continues to be debatable though under general European law it is submitted that the first lawful act of distribution will exhaust the distribution right irrespective of whether this concerns a commercial transfer or not.

## **B. Exceptions and Limitations**

The UK CDPA 1988 contains an extremely detailed enumeration of possible defences. The aim of the implementation was to retain the existing as far as possible.

The CDPA does not entail a defence on private copying in general, nor does it encompass a reprography defence. The most important changes to the Act relate to the

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<sup>291</sup> Cf. Edinburgh Court of Session, *Dr Jonathan Wills v Shetland Times* [1997] FSR 169.

restriction of copying in libraries and educational establishments to non-commercial purposes.

The permitted acts are structured into two distinct parts. Secs. 29-31 CDPA concern the major limitations for criticisms, review, research and private study and news reporting. This is preceded by a number of paragraphs concerning more detailed issues, in particular in the case of libraries. It should be noted that each of the defences listed is subject to a more wide ranging test whether the use constitutes, as such, constitutes fair dealing. In addition, certain limitations under common law continue to subsist, in particular as regards the fundamental common law public interest defence.

The three step test has not been implemented. The consultation document asserts that the test is an obligation on legislators rather than a re-exception to defences which right owners can immediately rely upon.

## **I. *Transient Copies***

Article 5 (1) EUCD has been transposed in a new Sec. 28A which faithfully reflects the provisions. Sec. 28A CDPA asserts that copyright is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work, and which has no independent economic significance.

The provision does not cover computer programs and databases. In relation to the transient copying of websites this will cause significant interpretation problems. The CDPA protects both databases (as own intellectual creations) and compilations. Only in the latter case, Sec. 28A will apply.

The parallel provision in relation to recordings of performances is to be found in Sec. 1A of Schedule II CDPA.

## **II. *Private Copying (Time Shifting)***

As noted, no general private copying exception exists. Article 5 (2) (b) is reflected in Sec. 70, which allows the recoding of broadcasts for the purposes of later viewing (time shifting; 'at a time more convenient'). This has been modified (Reg. 19) in that such recoding must take place in domestic premises<sup>292</sup> and that copies made in such way may not be used for any other purpose. In addition, the previous reference to cable services in sec. 70 (1) CDPA was repealed. The provision also makes it clear that any copy thereunder is an infringing copy for any further purposes, sec. 70 (2) CDPA. A similar

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<sup>292</sup> See the difficulties that have arisen in *Sony Music Entertainment (UK) Ltd v. EasyInternetcafé Ltd* [2003] EWHC 62 in relation to commercial services offering customers the ability to download sound recordings on publicly accessible terminals and then to have the files burned on CD-R.

provision (Sec. 71) permits the making of copies of a photograph of a broadcast which was likewise considered to come within the ambit of Article 5 (2) (b) EUCD. The same conditions apply.

### **III. *Libraries and Archives***

Specific acts are permitted in relation to both libraries and archives, Secs. 37 – 44 CDPA.

The CDPA was marginally amended so as to comply with Article 5 (2) (c). Secs. 41 – 42 CDPA permit the copying by librarians (not archivists) in order to supply copies to other libraries or to replace discarded, lost or destroyed works. The amendments now make it clear that such copy must not be made for commercial advantage.

The most important change in this respect concerns the permission for libraries to copy on behalf of patrons for commercial purposes, provided that such persons fulfilled the requirements for research or private study.

### **IV. *Broadcasters***

Sec. 68 CDPA, which was not changed, permits the incidental recording for purposes of supervision and control of broadcasts and other related services.

### **V. *Teaching and Scientific Research***

Article 5 (3) (a) was not implemented. The CDPA contains a general exception for purposes of research and private study. Section 29 CDPA has been amended so as to comply with Article 5 (3) (a) EUCD. Research now only relates to non-commercial activities. Private study, in addition, was defined so as to exclude any direct or indirect commercial purpose. No compensation is payable. In both cases, the source acknowledgement requirement was inserted.

Reg. 12 amended Sec. 35 CDPA which was likewise considered to fall within Article 5 (3) (a). According to Sec. 35, educational establishments may, for non-commercial purposes and with indication of source, may make recordings of a broadcast, or a copy of such a recording on behalf of an educational establishment. Sec. 35 (1A) continues to permit the communication to the public by a person situated within the premises of an educational establishment provided that the communication cannot be received outside the premises. However, the defence only applies if a licensing scheme is not in place. This permits the internal electronic communication. The provision is restricted to schools and other institutions thus designated, Sec. 174 (1) CDPA.

Sec. 36 was amended by Reg. 13. The provision limits the reprographic copying defence for purposes of instruction to non-commercial uses in educational establishments of passages from published works and inserts a requirement of source acknowledgement. The term reprography is defined as a process for making facsimile copies or involving the use of an appliance for making multiple copies. Interestingly, this includes copies from a work in an electronic form made by any electronic means. The provision will



therefore not necessarily be covered under Article 5 (2) (a) (i.e. on paper or similar) but complies with Article 5 (3) (a) EUCD.

Finally, Secs. 38, 39 and 43 CDPA, which deal with specific cases of copying by librarians for purposes of research (i.e. on behalf of the person fulfilling these criteria) have likewise been restricted to non-commercial uses.

Amendments under Article 5 (3) (BA) EUCD have also been made in relation to limitations applied to computer programs. Sec. 50 (BA) CDPA confirms that the limitation for observing, studying and testing the function of a computer program continues to apply for commercial and non-commercial purposes.

## **VI. *Disabled People***

Article 5 (3) (b) is reflected in Secs. 31A – 31F, introduced under the Copyright (*Visually Impaired Persons*) Act 2002. The limitation only applies to the visually impaired and does not extend to other disabilities. ‘Visually impaired’ means a person who is blind, has an impairment of visual functions which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; or who is unable, through physical disability, to hold or manipulate a book; or who is unable, through physical disability, to focus or move his (or her) eyes to the extent that would normally be acceptable for reading.

The provision allow such persons to copy, for personal use, both by way of reprography and in digital form, from the original format to an accessible format. In comparison to Article 5 (3) (b), the limitation is significantly narrower.

## **VII. *Current economic, Political or Religious Topics***

The scope of Article 5 (3) (c) is reflected in a number of permitted acts applying with regard to criticism, review and news reporting.

Sec. 30 CDPA permits the use of works by Fair Dealing for the purpose of criticism or review, of that or another work or of a performance of a work, provided that the use is accompanied by a sufficient acknowledgement and that the work has been made available to the public. The condition that the work has been lawfully published restricts the scope of the criticism and review defence. Under common law, a general defence based on public interest exists which permits, in singular cases, the publication of non-published works (which may include private journals or tapped telephone conversations).

The requirement to indicate the source is softened in a number of cases under Sec. 30 (3) CDPA, which specifically deals with cases of news reporting, where such acknowledgement would be impossible.

### **VIII.** *Quotations*

The CDPA does not contain a specific limitation dealing with quotations, though the Act relies on quotations both for research and private study (Sec. 29 CDPA) and criticism or review and reporting current events (Sec. 30 CDPA).

In addition, Article 5 (3) (d) was taken into account in relation to changes to Sec. 32 CDPA which allows, as noted, reproductions made for the purpose of illustration of teaching, for which now an express fair dealing element has been included so as to additionally comply with Article 5 (3) (d) EUCD.

### **IX.** *Public Security*

No amendments have been made to Secs. 50 ff. CDPA which permit certain uses for public purposes.

### **X.** *Speeches, Public Lectures etc.*

Again, no amendments have been. Speeches, lectures etc. are protected by copyright and may be reproduced for any fair dealing purpose. In particular, Sec. 30 CDPA permits the use of political and other speeches and public addresses for purposes of criticism and news reporting.

### **XI.** *Architectural Works etc.*

Section 62 CDPA allows certain types of copies to be made of certain artistic works on public display. The provision was not changed.

### **XII.** *Incidental Inclusion*

The incidental inclusion of works was permitted under Section 31 CDPA. No amendment has been made.

### **XIII.** *Advertising for Public Exhibitions etc.*

Sec. 63 CDPA permits the use of artistic works for purposes of advertisements for sale. The proviso was slightly amended so as to include communication to the public in such use.

### **XIV.** *Caricature and Parody*

Caricatures and parodies are not governed under a specific defence and must therefore come within the defences under Secs 29 or 30. However, UK courts are traditionally reluctant to accept parodies as non-infringing.

## **XV. *Artistic Works***

Sec. 62 permits the making of a graphic work, a photograph, film, broadcast or visual image of buildings, sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public. Sec. 62 (3) CDPA permits the issuing to the public (i.e. distribution in tangible form) and communication to the public of such copies.

## **C. Compensation System**

The UK does not have a levy scheme in place, nor is one foreseen. The Act provides, instead, for the possibility to establish licensing schemes, Sec. 118 CDPA. The particulars are regulate in meticulous detail and such schemes are subject, as far as the conditions of licensing are concerned, to the jurisdiction of the Copyright Tribunal. Such schemes may be established by collecting societies and need to be notified to the Secretary of State.

Most fair dealing provisions do not require the payment of compensation. With the exclusion of commercial purposes in cases of research and private study, and consequently in cases where a librarian was permitted to make copies for patrons for such purpose, the CLA (Copyright Licensing Agency) will now introduce licensing schemes for businesses. In addition, the defences permitting certain uses for visually impaired persons (Sec. 31B CDPA) and for making available in educational establishments (Sec. 35 CDPA) may be overridden by establishing licensing schemes.

## **D. Technological Protection Measures**

Article 6 EUCD was implemented in Secs. 296ZA – 296ZF CDPA. The previous version of the Act already contained stipulations which made it an infringement of copyright to override technological protection measures. This prohibited certain commercial dealings in circumvention devices though the act of circumvention as such did not incur liability. That section – Sec. 296 CDPA – now applies exclusively to computer programs and was amended so as to comply with the style of Article 6. Secs. 296ZA – 296ZF were introduced following Reg. 24 and closely resemble Article 6 EUCD.

### **I. *Acts of Circumvention***

Technological protection measures are protected against circumvention under Sec. 296ZA. Sec. 296ZF contains certain definitions and implements Article 6 (3) EUCD.

The provision applies with respect to effective technological measures which have been applied to a copyright work other than a computer program and protect against any person who does anything which circumvents those measures knowing, or with reasonable grounds to know, that he is pursuing that objective.

Sec. 296ZA (2) CDPA exempts, importantly, the circumvention of technological protection measures for purposes of research into cryptography unless the person circumventing thereby (or by issuing information derived from that research) prejudicially affects the rights of the copyright owner. The provision also applies to the database *sui generis* right and to performances.

The right is formulated as a positive right and vested in the owner of copyright, an exclusive licensee as well as any person who issued copies to the public or communicated to the public to which effective technological measures have been applied. The Act provides concurrent civil remedies and *locus standi* for each of these persons under Secs. 101(3) and 102(1). Circumvention does not constitute a criminal act.

The term “technological measures” is defined as ‘any technology, device or component which is designed, in the normal course of its operation, to protect a copyright work’ other than a computer program. This complies with Article 6 (3) EU CD.

From the wording of Sec. 296ZA it is apparent that the act of circumvention is sufficient so as to incur liability. The provision refers to “that objective” which arguably refers to the act of circumvention rather than a subsequent infringement of copyright, though this issue has not finally been decided. Thereby, it is only certain that circumvention is prohibited insofar as the subject matter safeguarded by technological protection measures is copyrightable. It is less obvious whether circumvention for a non-infringing use is acceptable. Whilst Sec. 296ZA makes it plain that the objective of circumvention must be to circumvent technological protection measures as such, rather than to commit a restricted act, it would seem that the circumvention with the objective to view, for instance, a film would be prohibited. This argument is supported by the fact that recent judicature held that the creation of a copy by loading a digital work into the memory of (here) a game console constitutes a fixation as required for a reproduction<sup>293</sup>. Conversely, technological protection measures are only protected insofar as they allow the control over non-authorized acts which are (additionally) restricted by copyright, and protection under Sec. 296ZA (1) CDPA must expressly not protect against uses which are not within the ambit of copyright. Therefore, the circumvention of technological protection measures in order to carry out non-restricted acts is permissible.

The Act further is unclear about the meaning of authorization in the context of technological protection measures. In general, the CDPA defines authorization as the existence of a license, which includes any permission to do a restricted act. In contrast to this, Sec. 296ZA (1) CDPA does not mention *authorization* in relation to circumvention. Given that the Act protects technological protection measures on the basis of restricting copyright infringement, a licensee of a work may arguably circumvent in so far as he complies with the terms of the license.

In case those terms are covered by copyright law (the CDPA permits, for instance, to divide exclusive rights) an act of circumvention would infringe. Sec. 56 (1) CDPA allows

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<sup>293</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc. v. Gaynor David Ball and others* [2004] EWHC 1738 (Ch).

the transfer of works in electronic form from a purchaser-licensee to a third party. The purpose is to align the effects of exhaustion (Sec. 18 (3) CDPA) with the fact that Sec. 17 (6) prohibits the making of temporary copies, which would otherwise render the subsequent purchaser an infringer for lack of a license to make temporary copies. The right to make temporary reproductions is transferred on the subsequent purchaser by way of a legal fiction. This fiction implies that the copyright owner who had not given notice has implicitly consented. Thereby, the purchase of a work in electronic form allows the subsequent purchaser to do all acts which the initial purchaser was licensed to do. If the initial purchaser was permitted to make copies despite technological protection measures being in place, the same will apply to the subsequent purchaser. Therefore, as far as Sec. 56 (1) CDPA applies, a right to circumvent may be transferred to a bona fide subsequent purchaser unless the subsequent purchaser knows that the copyright owner had objected.

## **II. *Effectiveness***

“Effectiveness” is defined, in accordance with Article 6 (3) EUCD, as access control or protection process such as encryption, scrambling or other transformation of the work, or a copy control mechanism, which achieves the intended protection and have been applied by the right holder. The term protection refers to the prevention or restriction of acts not authorized by the copyright owner and which are restricted by copyright. Thereby, the provision establishes a certain nexus between copyright infringement and technological protection measures control. During the implementation process, right holders opposed such restriction and demanded a general prohibition on all acts not expressly authorized by them, whether those acts constituted restricted acts or not. This was perceived as disproportionate as it would have exceeded the scope of copyright protection.

## **III. *Dealings in Circumvention Devices***

### **1) Implementation of Article 6 (2) EUCD**

Article 6 (2) EUCD has been implemented in Sec. 296ZB CDPA. Accordingly, a person commits an offence if he manufactures for sale or hire, imports otherwise than for his private and domestic use, or, in the course of a business sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, or possesses, distributes, or distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner, any device, product or component which is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures.

Sec. 296ZB (2) CDPA prohibits the provision, advertisement for and marketing of services which aim to provide circumvention tools under the same conditions as Sec. 296ZB (1) CDPA.

In contrast to Sec. 296ZA (1), Sec. 296ZB makes any commercial dealings an offence under civil and criminal and thus incurs liability for breach of a statutory duty. In relation to the conditions for such tort to be established, Sec. 296ZB appears narrower than Article 6 (3) CDPA in that activities in the course of business (or something of a similar character) are required. Article 6 (3) EUCD refers to commercial purposes which goes beyond an established business.

Sec. 296ZB (1) does not apply to certain enforcement agencies and, quite uniquely, to intelligence services.

## **2) Specific Sanctions**

Sec. 296ZB (4) imposes criminal liabilities on anyone who is guilty of an offence under Sec. 296ZB (1) and (2) CDPA. Sanctions include imprisonment up to three months and a monetary fine up to the statutory maximum on summary conviction. On conviction on indictment, the term increases to up to two years. Sec. 296ZC CDPA permits search warrants and forfeiture of certain appliances.

Sec. 296ZD CDPA provides certain civil rights and remedies.

## **IV. *Relationship with Limitations (Article 6 (4) EUCD)***

### **1) Overview**

The UK have implemented Article 6 (4) EUCD in Sec. 296ZE CDPA, according to which certain specifically designated permitted acts provide a remedy against the application of technological protection measures. The meaning of permitted acts is characterised as any act under Part I of Schedule 5A to the CDPA, which was inserted in the implementation process and enlists a substantial number of permitted acts to which the remedy applies. The concept employed in the UK is based upon voluntary measures and agreements between copyright owners, exclusive licensees or persons issuing copies or communicating a work to the public. It does not apply to computer programs.

Sec. 296ZE (9) excludes the exercise of the remedy in cases where works are provided by interactive services, which complies with Article 6 (4) EUCD.

The provision operates in so far as effective technological protection measures prevent a person (or a representative of a class of persons) from carrying out a permitted act.

### **2) Protected Beneficiaries**

The remedy is open to those beneficiaries who, either individually or as part of a group, are comprised in the list under Part I of Schedule 5A. This includes most of the very specific permitted acts under the CDPA. This includes all permitted acts which by their nature may be affected by technological protection measures with the exception of Sec. 30, i.e. fair use for the purpose of criticism or review, and concerns (partially) the limitations under Articles 5(2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(c)

EUCD. Importantly, the schedule covers acts permitted for (non-commercial) research and private study. In compliance with Article 6 (4) (4) EUCD, Sec. 296ZE (10) CDPA requires that the beneficiary has lawful (not: legal) access. The CDPA does, strangely, not contain a definition of “lawful”. The term is described in relation to computer programs as referring to a person who has a right to use a program (Sec. 50A (2) CDPA). In relation to Sec. 296ZE (1) CDPA, by way of analogy the definition of lawful access therefore refers to purchases and other forms of lawful possession of a carrier.

In relation to performances, the enumeration is more restrictive and, apart from minor permitted acts, only covers acts done for purposes of instruction or examination and recording of broadcasts by educational establishments. In addition, Sec. 296ZE CDPA allows lawful users of databases to file a complaint.

The provision does not apply with regards to certain agreements on interactive uses. However, the remedy might apply with regard to subsequent acts covered under Sec. 296ZE once access has been granted, such as in relation to works provided online. This is, however, debatable.

## **V. *Complaints Procedure***

Sec. 296ZE CDPA (Reg. 24) does not give an immediately actionable right to beneficiaries and thus no positive obligation of the person applying technological protection measures subsists. Beneficiaries must serve a notice of complaint to the Secretary of State, who has a discretion to give the owner copyright work or an exclusive licensee directions as appear to the Secretary of State to be “requisite or expedient”. The procedure is open to all cases where a voluntary agreement or voluntary measures are in place and where not. The Secretary of State is to establish whether any voluntary measures or agreements subsists or whether the owner of copyright etc. should be ordered to make means available for carrying out permitted acts to the extent necessary. The section also confers a number of procedural powers upon the Secretary of State.

Once an order is directed, the owner of copyright has a legal duty to provide such means, and non-compliance results in a breach of a statutory duty. This is actionable either by the complainant or a representative of an eligible user group.

The procedure foreseen has been criticized as time consuming, tedious and practically inapt. Indeed, beneficiaries have no option but to undergo the complaints procedure before an order can be made. Beneficiaries will potentially have to instigate such proceedings each time they wish to use a different work. The Act leaves it open in how far the direction given by the Secretary of State has a binding effect so as to implement more large scale agreements. The order by the secretary of state, in addition, is not enforceable as such under normal judicial enforcement procedure. Beneficiaries who have been granted such order will, in order to enforce it, have to rely on instigating yet another judicial proceeding before courts of justice.

## **VI. Special Rules for Computer Programs**

As noted, computer programs do not fall under Sec. 296ZA – 296ZF CDPA. Sec. 296, which previously prohibited the circumvention – solely - of copy control mechanisms, applied to works in electronic form now applies to computer programs exclusively. SEC. 296 CDPA, as amended, only relates to those acts prohibited under Sec. 296ZB. The same wording has been used though the act need not be committed in the course of a business.

## **E. Rights Management Information**

Rights Management Information protection was newly introduced in Sec. 296ZG CDPA which implements Article 7 EUCD (Reg. 25). No such provisions previously existed. There are virtually no discrepancies and the public debate was, in comparison to technological protection measures, much less agitated.

In strict accordance with the Directive, Sec. 296ZG CDPA prohibits the removal or alteration of rights management information to induce, enable, facilitate or conceal infringement of rights. Criminal sanctions do not apply, despite demands from industry. As under Sec. 296ZA – 296ZB CDPA, the right to remedies is also vested in exclusive licensees and persons distribution or communicating to the public works which include rights management information.

## **F. Sanctions**

The issue of tightening sanctions was extensively discussed. The UK Government introduced new provisions which are directed towards online piracy and new criminal offences were introduced which specifically prohibit the illegal communication to the public by making available, which requires that the act is done in the course of business or “to such an extent as to affect prejudicially the copyright owner. Intent (*mens rea*) is required, Secs. 107 and 198 CDPA. In relation to file sharing, this criminalizes the large scale upload of protected works only. Lack of knowledge is a defence.

Non-exclusive licensees now have the same remedy as exclusive licensees in relation to acts of communication to the public, Sec. 101A CDPA, which was intended to comply with Article 8 (2) EUCD. Article 8 (3) EUCD was implemented in anew Sec. 97A CDPA which expressly permits right holders to seek injunctions against service providers who have actual knowledge of a person infringing copyright, and the same applies to performers rights under Sec. 191JA CDPA.

## **G. Conclusion**

The UK implemented the Directive in a compliant fashion. The mandatory provisions have been implemented according to the legislative freedom permitted. There is



potential for discrepancy as regards Article 5 (1) in relation to databases. There are no apparent discrepancies as regards limitations. Although the structure of the Act has not been changed, the restriction to non-commercial uses, as required, is present. Arguably, there is a more subtle deviation in that the tradition of permitted acts is based upon a further consideration of fair dealing, and in some minor cases outside the core scope of the Directive unwritten limitations under common law might apply. The provision on limitations for disabled people is much narrower in that it applies only to visually impaired persons. The licensing and remuneration scheme is more complex than in author's right jurisdictions and the Act relies on authors to organize such remuneration on their own initiative. Remuneration is to be paid under such licensing scheme which now requires collective licensing for commercial uses previously permitted, and such scheme can be, and has been, initiated in relation to other uses (such as in libraries). The existence of a licensing scheme precludes a fair dealing defence in cases where this is expressly recognized by law. The absence of "private copying" limitations displays a much more rigid approach than in author's right systems and virtually excludes any defence in relation to illegal file sharing, both as regards the making available and a subsequent download. The making available of works also renders the copy infringing since the storing of such work constitutes a reproduction and a subsequent act of making available. Article 6 (1) was implemented in a way reflecting its purpose to protect copyright and does not apply to uses outside copyright. Article 6 (2) was implemented as an offence but qualified by a use in the course of business which appears more restrictive than any commercial purpose. Article 6 (4) has been implemented observing the instructions of the Directive. The way in which the UK intends to strike a balance between permitted acts and technological protection measures is, however, doubtful and likely to deter beneficiaries.

